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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DARRIN BLACK,

Petitioner,

v.

METRO, a political subdivision of the State of Oregon,

Respondent.

ROGER J. MIRACLE and ANN M. MIRACLE,

Petitioners,

v.

METRO, a political subdivision of the State of Oregon,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1: Does the Constitution recognize the retroactive mooting of a judgment as the taking of property rights through the Takings Clause and/or as arbitrary and capricious conduct prohibited by the Due Process Clause, and has a judicial taking occurred when an appellate court moots the judgment of the trial court when such judgment was effectuated by stipulation of the parties?

QUESTION 2: Whether the U.S. Supreme Court's holding in *Plaut* requires modification as it pertains to matters where the law was changed after the trial court determination has resulted in a final judgment to require an appellate court to reach the merits of the appeal and apply a law retroactively only where there is reversible error in the entry of the judgment in order to avoid an unconstitutional result.

QUESTION 3: Whether the Oregon Court of Appeals erred in applying the mootness doctrine to the trial court determination when it was inequitable to the parties in violation of this Court's direction under *U.S. v. Munsingwear, Inc.*

QUESTION 4: Whether *Plaut* and similar Oregon state cases authorize a violation of the Due Process Clause to allow an appellate court to moot a trial court judgment on issues that are not adequately preserved before that trial court with respect to a change in law occurring subsequent to entry of a trial court judgment.

QUESTION 5: Is the application of a retroactive change in law to moot a trial repugnant to the Constitution where the matter was submitted to the trial court entirely on the factual stipulations of the parties, including the parties' stipulation that a valid and compensable claim existed under the prior law, leaving the amount of damages as the only issue remaining for the trial court's determination? And should *Plaut* be applied only in accordance with this Court's recent determination in *Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez.* and, *Jideonwo v I.N.S.* (7th Cir) *citing Bradley v. School Bd. Of City of Richmond*?

QUESTION 6: Whether a "claim" and "a cause of action" within the context of Measure 49 as reconciled with Measure 37 are distinct and independent processes such that a Measure 37 cause of action is not subject to extinguishment by section 5 of Measure 49; and/or whether the Oregon Court of Appeals misinterpreted or misapplied Measure 49 retroactively to moot the underlying cause of action where no language in Measure 49 expressed an intent to retroactively extinguish an existing cause of action.

LIST OF PARTIES

In addition to the Respondent, the Petitioners are also serving Virginia L. Bleeg and Harold and Rebecca MacLauglan who may also be affected by any decison.

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OPINIONS AND ORDERS BELOW

The unpublished denial of the petition for reconsideration to the Oregon Supreme Court dated October 1, 2010 was denied on December 9, 2010. (App. F)

The unpublished denial of the petition for review to the Oregon Supreme Court dated September 17, 2010 is codified at 240 P.3d 1097. (App D)

The published decision of the Oregon Court of Appeals dated June 24, 2009 is codified at 211 P.3d 302. (App. A)

The unpublished general judgment of the Oregon Circuit Court Clackamas County dated December 5, 2007 awarding the petitioners' just compensation. (App. B)

The Letter Order of the Oregon Circuit Court, Clackamas County, dated October 12, 2007 is set forth in Appendix C.

JURISDICTION

This Court has jurisdiction to review the denial of certiorari by the Oregon State Supreme Court on a Petition for Writ of Certiorari pursuant to 28 U.S.C. 1257. The denial of certiorari was entered by the Oregon State Supreme Court on September 17, 2010. A Petition for Reconsideration was filed on October 1, 2010, and was denied by the Oregon State Supreme Court on December

9, 2010. This Petition for Writ of Certiorari is timely filed within ninety (90) days from the denial of the petition for reconsideration by the Oregon State Supreme Court and within the thirty (30) day extension granted by the Honorable Anthony M. Kennedy, Justice of the United States Supreme Court for the Ninth Circuit which extended the time to file to and including April 8, 2011.

STATUTORY PROVISIONS

The pertinent provisions of the applicable state statues are contained in Appendices G and H.

INTRODUCTION

The State of Oregon unconstitutionally applied a statute retroactively to vacate otherwise valid court judgments. The decision rendered, if allowed to stand, and further applied would jeopradize any judgment entered by an Oregon Court to being the subject of a judicial taking in violation of *Stop The Beach Renourishment Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. p. 2592 (2010).

STATEMENT OF THE CASE

Pursuant to Measure 37, codified as ORS 197.352 hereinafter (**Measure 37**), each petitioner submitted a Measure 37 claim prior to December 4, 2006, by filing a written demand for compensation to the respective public entities responsible for enacting the regulations which had restricted the use of their property, resulting in a loss of fair market value. All public entities, except Metro, either

waived the restrictive land use regulations or determined none applied. Metro denied each of the petitioner's claims.

Pursuant to 197.352(6), after more than 180 days had passed from submission of their claims, petitioners individually commenced an action for compensation in Clackamas County Circuit Court as provided for under ORS 197.352(6). Their two cases were consolidated with two others at the trial court.

Subsequent to a stipulated facts trial, the trial court held each petitioner had suffered a loss in fair market value as a result of Metro's land use regulations. A money judgment reflecting the trial court's final determination was entered for petitioners on December 5, 2007, prior to the December 6, 2007, effective date of chapter 424 Oregon Laws (2007) hereinafter referred to as Measure 49. (To allow separate recording as to the individual judgments, the judgment of December 5, 2007 was supplemented by individual judgments on December 7, 2007 which were entered *nunc pro tunc* December 5, 2007.

On June 24, 2009, after briefing and oral argument, the Oregon Court of Appeals filed its written opinion mooting petitioners' cases and remanding them to the trial court with an order to the trial court to vacate the judgments. The Court of Appeals held petitioners' cases were moot and no longer justiciable because the passage of Measure 49 deprived the trial court judgments of any continuing viability.

The ruling was solely based upon the Oregon Supreme Court's decision in *Corey v. Department of Conservation*

and Development, 344 Or. 457, 184 P.3d 1109 (2008), which ruled that "Measure 49 by its terms retroactively deprives Measure 37 waivers and all orders disposing of Measure 37 claims of any continuing viability..." In so ruling the Oregon Court of Appeals extended the holding in *Corey* to include retroactive application to circuit court civil causes of actions for compensation and judgments on appeal which were docketed prior to the effective date of Measure 49. The ruling did not address the fact that Measure 49 amended, but did not repeal, Measure 37. Nor did the Court of Appeals perform any analysis of existing case law as to the application of retroactive legislation.

Petitioners filed a Petition for Review to the Oregon State Supreme Court within the time allowed pursuant to an Order granting an extension to file. Such Petition was denied by the Oregon State Supreme Court on September 17, 2010. A Petition for Reconsideration was filed with the Oregon State Supreme Court on October 1, 2010, and was denied on December 9, 2010.

REASONS FOR GRANTING THE PETITION

I. THIS DECISION PLACES THE OWNERS OF EVERY JUDGMENT RENDERED BY ANY COURT OF THE STATE OF OREGON IN DANGER OF HAVING THEIR PROPERTY, IN THE FORM OF JUDGMENTS, TAKEN AT THE WHIM OF OREGON'S JUDICIARY IN VIOLATION OF THE TAKINGS CLAUSE AND THE DUE PROCESS CLAUSE AS ENUNCIATED IN *STOP THE BEACH RENOURISHMENT INC. V. FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION*, 130 S. Ct. p. 2592 (2010).

II. STAUTORY INTERPRETATION OF MEASURE 49 AND HOW IT APPLIES TO CAUSES OF ACTION.

In *Burgess v. U.S.* the Court said:

> "Statutory definitions control the meaning of statutory words ... in the usual case." *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201, 69 S. Ct. 503, 93 L. Ed. 611 (1949). *See also Stenberg v. Carhart*, 530 U.S. 914, 942, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000) ("When a statute includes an explicit definition, we must follow that definition ...."); 2A N. Singer & J. Singer, Sutherland on Statutory Construction § 47:7, pp. 298-299, and nn. 2-3 (7th ed.2007) (hereinafter Singer).
>
> Furthermore, "[a]s a rule, [a] definition which declares what a term 'means' ... excludes

> any meaning that is not stated." *Colautti v. Franklin*, 439 U.S. 37 9, 392-393, n. 10, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) (some internal quotation marks omitted).

Black's Law Dictionary defines "cause of action" as "the fact or facts which give a person a right to judicial redress or relief against another." *Ibid.*, 6th Edition, West Publishing, St. Paul Minnesota, 1991, p. 152. Furthermore *Black's Law Dictionary* defines "claim" as "to demand as one's own or as one's right to assert; to urge; to insist." *Id.* at p. 169.

In this matter, the first and potentially dispositive issue is the proper interpretation of Measure 49; that it amended, not repealed, former ORS 197.352 (Measure 37) renumbered as ORS 195.305 by Measure 49. The "cause of action" was not specifically eliminated by Measure 49, it simply was not preserved for future claimants. The disparate meanings for a "claim" and a "cause of action" were not considered by the Court of Appeals. The definition for a "cause of action" is found in ORS 197.352(6) which specifically provides:

> If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this section, the present owner shall have a cause of action for compensation under this section in the circuit court in which the real property is located and the present owner shall be entitled to reasonable attorney fees, costs, and other disbursements reasonably incurred to collect the compensation.

This written demand for compensation is referred to as a "claim" in ORS 197.352. Not only is a "claim" not the equivalent of a "cause of action," a "claim" must first be filed before a "cause of action" could accrue under ORS 197.352(6).

The cause of action for compensation under ORS 197.352 (6) continues to be available for existing actions since the text of Measure 49 does not specify that it is to be abolished retroactively. Petitioners argued at both the trial court and appellate court level that Measure 49 has no effect on a "cause of action" for compensation that concluded with entry of a judgment prior to the effective date of Measure 49, and that their cases remain justiciable.

The Court of Appeals, however, avoided any statutory interpretation, ignoring the methodology for statutory construction set forth by *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610, 859 P. 2d 1143 (1993), ORS 174.020, and this Court's recent decision in *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009). Specifically, the Court of Appeals summarily held that the petitioners' cases were not justiciable because the "ongoing dispute" involved "Measure 37 claims for just compensation" and "Measure 49 supersedes those Measure 37 claims and deprives trial court's judgments in this case of continuing viability (emphasis added) Slip Op. at 5.

The Court of Appeals erred in mischaracterizing the Oregon Supreme Court's holding in *Corey v. Department of Land Conservation and Development*, *supra* by extending the interpretation of Measure 49's effect on Measure 37's claims to include extinguishment of judgments and "causes of action" for compensation

under ORS 197.352(6). The Court of Appeals reached that conclusion without review and without applying any of the well-established principles of statutory interpretation.

In holding that "Measure 49 by its terms deprives Measure 37 waivers-and all orders disposing of Measure 37 claims-of any continued viability..." *Corey v. Department of Land Conservation and Development*, 344 Or. 457, 466-67, 184 P.3d 1109 (2008), the Oregon Court of Appeal's interpretation was limited to Measure 49 effect on "claims" when it explained the language in section 5 of Measure 49's:

> A claimant that filed a claim under ORS 197.352 [Ballot Measure 37 (2004)] on or before that date or adjournment sine die of the 2007 regular session of the Seventy-fourth Assembly is entitled to just compensation as provided in..." *Id.* at 463.

The holding in *Corey, supra*, is erroneously being expanded by the Oregon Court of Appeals to include judgments entered upon causes of action, on appeal, under the premise that the heart of such actions are Measure 37 claims for relief. That interpretation is unsupported by the text of Measure 49.

A. MEASURE 49 FAILS TO SUPPORT THE RETROACTIVE ABOLISHMENT OF A "CAUSE OF ACTION" UNDER MEASURE 37

In *Fromme v. Fred Meyer, Inc.* the Oregon Supreme Court discussed retroactive application of legislation and stated, "[a]s a general rule, the court construes

legislation to operate prospectively unless it appears that the legislature intended to enact retroactive legislation." *E.g., Mahana v. Miller*, 281 Or. 77, 80, 573 P.2d 1238 (1978). *Ibid.*, 306 Or. 558, 561, 761 P.2d 515 (1988.) To read into section 5 that claims include causes of action would be to add words and meaning that the Legislature itself did not use and the voters did not approve or even contemplate. This is impermissible. Measure 37 was a referendum put on the ballot by the voters, but Measure 49 was legislation that was referred to the voters for their approval. If the language of Measure 49 does not refer to causes of action or judgments, then the voters certainly could not be said to have voted on that. In *Republic of Austria v. Altmann* this Court indicated as follows:

> In describing the general presumption against retroactive application of a statute, the Court there declared, inter alia, that, if a federal law enacted after the events in suit does not expressly prescribe its own proper reach but does operate retroactively- i.e., would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed-it does not govern absent clear congressional intent favoring that result. (*Landgraf v. USI Film Products* 511 U.S. 244,) 280, 114 S. Ct. 1483, (128 L. Ed. 2d 229).

Ibid., 541 U.S. 677, 678, 124 S. Ct. 2240, 159 L. Ed. 2d 1.

The Court of Appeals also failed to address the continued viability of ORS 197.352 until Measure 49 became effective. Any changes to Measure 37 causes

of actions were prospective, rather than retroactive. In multiple sections, Measure 49 plainly provides for the ongoing viability of the cause of action for compensation in subsection (6) of ORS 197.352 "as immediately in effect before the effective date of this 2007 Act [Measure 49]." For example, Section 11(7) of Measure 49 specifically provides:

> When relief has been claimed under sections 5 to 11 of this 2007 Act:
>
> (a) Additional relief is not due: and
>
> (b) An additional claim may not be filed, compensation is not due and a waiver may not be issued with regard to the property under sections 5 to 22 of this 2007 Act or ORS 197.352 as in effect immediately before the effective date of this 2007 Act.

The continuing viability of ORS 197.352 as immediately in effect prior to the effective date of this 2007 Act [Measure 49] is also found in subsection (2)(2)(a) of Measure 49.

The plain language in section 11(7) *supra*, provides that when relief is not claimed under Measure 49, compensation is still due under Measure 37. Measure 37 was not repealed, only prospectively amended. "[A] repeal of an element of a civil cause of action may not be done through innuendo, but may be done only through explicit legislation." *Brown v. Vogt*, 272 Or. 482, 483-95, 538 P.2d 362 (1975).

Further support for the determination that Measure 49 elimination of the "cause of action" in ORS 197.352(6) is only prospective is found within the text of Measure 49. In section 4, the amendments to ORS 197.352 are not effective until the effective date of Measure 49:

> ORS 197.352 is amended to read:
>
> > (1) If a public entity enacts one or more land use regulations that restrict the residential use of private real property or a farming or forest practice and that reduce the fair market value of the property, then the owner of the property shall be entitled to just compensation from the entity that enacted the land use regulation or regulations as provided in sections 12 to 14 of this 2007 Act.

See also subsections 4(2), 4(5), and 4(6).

With clear, unambiguous language, the amendments in ORS 197.352 providing for the repeal of subsection (6) apply only to new claims under section 12 to 14 of Measure 49. "[A] party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it," *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009), as the courts ordinarily presume that the legislature intended terms to have their plain, natural, and ordinary meanings. *Id.*

In this instance, the Court of Appeals failed to do any analysis to determine if Measure 49 expressed an intent to abolish causes of action. Conspicuously absent is any language retroactively applying the amendments in ORS 197.352 to repeal a pre-existing "cause of action."

"Unless the legislature expressly provides that a statute applies retroactively, the general rule is that the rights and liabilities of a person who is affected by an event are defined and measured by the statutes in effect at the time of the event." *Barnes v. City of Portland*, 120 Or. App. 24, 852 P.2d 265, *Petition for Review Denied*, 317 Or. 583 (1993), citing *Whipple v. Hoswer* 291 Or. 475, 632 P.2d 782 (1981). The judgments on appeal, then, should be reviewed based on the law in effect at the time they were entered (Measure 37), and not Measure 49. "In the face of competing constructions of an enactment, we generally are required to "choose the interpretation which will avoid any serious constitutional difficulties." *State v. Lanig*, 154 Or. at 674 (*citing State v. Duggan* 290 Or. 369, 373, 622 P.2d 316 (1981)); *State v. Meyers*, 153 Or. App. 551, 560, 958 P.2d 187 (1998).

Furthermore, insertion of a provision to abolish a judgment entered pursuant to a Measure 37 cause of action would be the same as judicial legislation and would amount to a judicial amendment of the statute ex post facto. *See, Caldwell v. Wunderlich*, 26 Or. App. 407, 552 P.2d 1321 (1976) (*citing State v. LaFollett*, 132 Or. 257, 284 P.283 (1930)).

Oregon courts have not directly addressed what the needed criteria is for retroactive legislation. In Measure 49, there is no express intent to abolish a cause of action and no expressed rational basis to support stripping petitioners of all relief.

Measure 49's stated goals (i.e., to ensure that Oregon Law provides just compensation for unfair burdens while retaining Oregon's protections for farm and forest uses

and the state's water resources (ORS 195.301(2)) do not address causes of action. The goals do not espouse a basis for abolishing all remedies for petitioners, nor is the elimination of a cause of action a means to achieve the stated goals. The Oregon Court of Appeals interpretation of Measure 49, however, has had just that effect and has prevented the petitioners from receiving "just compensation for unfair burdens" as promised. *Ibid.* Consequently, no relief is available to the petitioners under Measure 49 because it excludes all claims arising from restrictive land use regulations enacted prior to and contemporaneously with the property being brought into the urban growth boundary ("UGB"). Measure 49 (9) (h-j). Because the petitioners here all have property inside the UGB, they fail to qualify for any remedy under Measure 49.

Absent an expressed intent by the Legislature to apply Measure 49 retroactively to eliminate a "cause of action", distinct from a "claim", Measure 49 should only be given prospective application. The petitioners' judgments should remain justiciable and be reviewed, on appeal, under the law in effect at the time they were entered.

B. RETROACTIVE APPLICATION OF MEASURE 49 TO PETITIONERS' JUDGMENTS RAISES CONSTITUTIONAL ISSUES

The retroactive application of a statutory amendment that abolishes all remedies has constitutional ramifications. If the Court finds Measure 49 affected the petitioners' judgments in their circuit court cause of action suit, then the Court must determine if such legislation is

constitutionally valid as applied to the petitioners. The Oregon courts have long recognized that a petitioner has a vested right in a judgment that cannot be taken away by legislation except under specific circumstances. *See Newsom v. Greenwood*, 4 Or. 119, 121-122, 1871 WL 1122 (Or) (1871); *Thomas v. City of Portland*, 40 Or. 50, 52 66 P 439 (1901); *Fisk v. Leith et al*, 137 Or. 459, 299 P 1013 (1931); *Hall v. Northwest Outward Bound School, Inc.*, 280 Or. 655, 572 P.2d 1007 (1977); *Barnes v. City of Portland*, 120 Or. App. 24, 852 P2d 265 (1993); *Ettor v. City of Tacoma*, 228 U.S. 148, 33 S. Ct. 428 (1913); *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994).

In *Bradley v. School Bd. of City of Richmond* this Court indicated as follows:

> We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

Under existing opinions of the Oregon Supreme Court, there exists a question as to whether it is constitutional under the 14th amendment for the legislature to deprive a landowner of a remedy for damages to property fixed under an existing statute. In *Hall v. Northwest Outward Bound School, Inc.* 280 Or. 655, at 661-662, 572 P.2d 1007 (1977), referencing *Ettor v. City of Tacoma*, 228 U.S.148, 33 S. Ct. 428 (1913), the Oregon Supreme Court stated, [t]he [United States Supreme] Court held that retroactive application of the repeal deprived the landowner of a remedy for a liability of the city fully fixed under the prior statute..."

The right to damages in *Ettor, supra*, closely parallels the petitioners' causes of action. The remedy given was for damages resulting from the city or government's action. Measure 37 gave the landowners a remedy for damages if Metro did not waive their regulations. The Oregon Supreme Court's opinion in *Hall v. Northwest Outward Bound School, supra*, acknowledged the validity of *Ettor, supra*. This issue was not addressed by the Oregon courts and must be addressed by this Court if it is found that Measure 49 abolished causes of action under Measure 37.

C. THE VACATING OF THE JUDGMENT IN THIS MATTER IS A TAKING OF PROPERTY RIGHTS

UNITED STATES CONST. AMEND. V states, in pertinent part, as follows:

> "No person shall... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

In *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection* this Court stated as follows regarding the takings clause:

> "[T]hough the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing."

Ibid., 130 S. Ct. 2592, 2601.

> This court continued on to identify various circumstances where it had found there has been a taking. Here, like in *Webb's Fabulous Pharmacies, Inc. v. Beckman*, 449 US 155, 163-165, there has been a "recharacterization as public property what was previously private property". Here, petitioners private property, money judgments against Metro, were taken by judicial action and handed back to Metro by relieving it of the financial obligation .

D. RECONCILIATION OF THIS COURT'S HOLDINGS ON CONCLUSIVENESS OF STIPULATIONS IN RELATION TO THE APPLICATION OF MOOTNESS DOCTRINE TO RETROACTIVE CHANGES OF LAW.

UNITED STATES CONST. AMEND. XIV §1 states, in pertinent part as follows:

> [n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In *Plaut*, this Court stated that, "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." *Ibid.*, 514 U.S. 211, 226, 115 S. Ct. 1447, 1457 (U.S. Ky. 1995); *see*, *Landgraf v. USI Film Products*, 511 U.S. 244, 273-280, 114 S. Ct. 1483, 1501-1505, 128 L. Ed. 2d 229 (1994). This Court distinguished therein "between judgments from which all appeals have

been forgone or completed, and judgments that remain on appeal (or subject to being appealed)" stating that it "is implicit in what [U.S. Const.] Article III creates: not a batch of unconnected courts, but a judicial *department* composed of 'inferior Courts' and 'one supreme Court.'" *Id.*, 514 U.S. at 227.

> Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must decide according to existing laws. Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.

In *Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez*, this Court opined as follows:

> Litigants, we have long recognized, "[a]re entitled to have [their] case tried upon the assumption that ... facts, stipulated into the record, were established." *H. Hackfeld & Co. v. United States*, 197 U.S. 442, 447, 25 S. Ct. 456, 49 L. Ed. 826 (1905). This entitlement is

the bookend to a party's undertaking to be bound by the factual stipulations it submits. See *post*, at 3005 (ALITO, J. dissenting)(agreeing that "the parties must be held to their Joint Stipulation"). As a leading legal reference summarizes:

> "[Factual stipulations are] binding and conclusive ..., and the facts stated are not subject to subsequent variation. So, the parties will not be permitted to deny the truth of the facts stated, ... or to maintain a contention contrary to the agreed statement, ... or to suggest, on appeal, that the facts were other than as stipulated or that any material fact was omitted. The burden is on the party seeking to recover to show his or her right from the facts actually stated." 83 C.J.S. Stipulations § 93 (2000)(footnotes omitted).

This Court has accordingly refused to consider a party's argument that contradicted a joint "stipulation [entered] at the outset of th[e] litigation." *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000). ...[F]actual stipulations are "formal concessions ... that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, a judicial admission ... is conclusive in the case." 2 K. Broun McCormick on Evidence § 254, p. 181 (6th ed. 2006)(footnote omitted).

Ibid., 130 S. Ct. 2971, 2983, 177 L. Ed. 2d 838 (U.S. (Cal.) 2010). The 1st Circuit Court of Appeals has stated that, "[a] stipulation as to facts also functions as a waiver of legal defenses to the establishment of the particular element to which the parties have stipulated, and therefore is not reviewable on appeal." *United States v. Silva*, 554 F.3d 13, 23-24 (1st Cir. 2009), *citing United States v. Meade*, 175 F.3d 215, 223 (1st Cir. 1999). Under 83 C.J.S. § 86, it states that submission of a matter on stipulated facts is akin to the parties requesting a directed verdict. *Ibid.* (citations omitted). This Court has held that, "[a] party cannot complain of a judgment or order entered in accordance with his request." *U.S. v. City of Memphis*, 97 U.S. 284, 1877 WL 18624 (U.S. 1877).

Pursuant to Measure 37 each petitioner owned property in the form of a money judgment reflecting the trial court's final determination which was entered for petitioners on December 5, 2007, prior to the enactment of the amendments contained in Measure 49.

In its determination of this matter, the Oregon Court of Appeals applied the precepts dictated by this Court in *Plaut*, but did so through the Oregon Court of Appeals' case of *State ex. rel. English v. Multnomah County*, 227 Or.App. 419, 206 P.3d 224 (2009)("**English I**" as referenced therein). The Oregon Court of Appeals analyzed its own prior cases of *Corey v. DLCD*, 344 Or. 457, 464, 184 P.3d 1109 (2008) and *Cyrus v. Board of County Commissioners*, 226 Or.App. 1, 202 P.3d 274 (2009), specifically finding that Measure 49 was retroactive and applied "to *all* Measure 37 claims, successful or not, regardless of where they [were] in the Measure 37 process." *Id.*, *citing English I* at 426-427 (*quoting Corey* at 465) (emphasis in original).

Corey stated "Measure 49 by its terms deprives Measure 37 waivers—and *all* orders disposing of Measure 37 claims—of any continuing viability." *Id.*, *citing English I* (*quoting Corey* at 466-467)(emphasis in original). *English I* went on to explain the court's mootness determination in *Cyrus* as supported by the availability of litigation of their issues under Measure 49. However, in *English I* the matter was differentiated since the claim was considered "merged" into the judgment because of the voluntary dismissal of that matter during the appellate process by the State, resultant of a final determination of the judicial department. *Id.* This differentiation was found to not apply to the instant matter The Oregon Court of Appeals explained it as "English had a judgment that (1) adjudicated her Measure 37 claim for just compensation long before the effective date of Measure 49 and (2) was not subject to judicial revision." *Id.*, *citing English I* at 428.

While the Oregon Court of Appeals acknowledged that the appeal in *English I* arose from enforcement activities regarding English's efforts to compel the county to satisfy the judgment for compensation through mandamus proceedings, it ultimately distinguished it from the current matter where a valid stipulation to all facts, including those pertaining directly to whether a valid claim existed under Measure 37, left only Metro's challenge to the valuation of such claim to which the parties had not entered a stipulation. In a later case in the English matter, the Oregon Court of Appeals mimicked *Plaut* by stating that, "[w]hen the dispute involving a predicate Measure 37 claim for just compensation is ongoing (whether in another forum or on appeal), Measure 49 supersedes the Measure 37 claim and requires the parties to proceed under the new standards in Measure 49 to determine their

rights." *Id.*, *citing English II*. In determining this matter, the Oregon Court of Appeals erroneously engaged in a judicial taking by adopting an automatic reversal of the trial court judgments in any and all cases pertaining to Measures 37 (Chapter 1 Oregon Laws 2005), regardless of individual circumstances such as a valid and binding stipulation between the parties or the pre-dating of the entry of judgment on said stipulated facts, and absent any review whatsoever of the merits of the appeal to determine whether affirmance was appropriate to render the trial court judgment final.

Resolution of the questions at issue herein requires clarification of the conflicting decisions rendered by this Court under *Plaut* and *Martinez*, *supra*. While the Oregon Court of Appeals adopted a procedure similar to *Plaut* by applying Measure 49 retroactively to moot petitioners' claims since the matter was still pending final determination by the judicial department, petitioners believe such matters remain subject to any viable, binding stipulation of the parties before the trial court, as this Court very recently said in it's analysis in *Martinez*. The only exceptions to the binding effects of stipulations were not argued by Metro nor found by the Oregon Court of Appeals, which simply erred by entering a determination mooting the appeal which was directly contrary to the parties' stipulation.

The parties herein stipulated as to all of the facts of the case, including that the petitioners herein maintained viable claims against Metro under Measure 37 for which they were entitled to just compensation. The issue at hand was by what method the damages should be calculated. Under Metro's method, the claimed damages were zero.

The damages under the petitioners' theory were extensive. Both petitioners submitted stipulated facts to the trial court and the Petitioners won the legal argument, which allowed them to be awarded their damages.

As this Court indicated in *Martinez*, petitioners herein were entitled to rely upon the binding nature of the stipulations of the parties before the trial court, and this is true even if the law changed. The application of a change of law retroactively under *Plaut* to defeat the stipulated facts of the parties would overturn this Court's long-standing precedent under *H. Hackfeld & Co., supra*, as acknowledged in *Martinez*. *Plaut* is silent as to whether the merits of an appeal should be addressed or whether the matter can be considered automatic, without reaching the individual circumstances and merits of an appeal, as the Oregon Court of Appeals did in this matter. It is the petitioners' contention that *Plaut* did not authorize automatic reversals based on changes of law that may moot an inferior court's determination when applied retroactively since it would not account for various circumstances that could exist such as (1) stipulations between the parties as to all of the issues foreclosing further judicial review of those stipulated facts, thereby binding the parties to such matter as a final determination of the judicial department under *Plaut*; (2) where affirmance on appeal may resort back to the trial court's valid judgment date predating the change of law at issue; or (3) where the change of law cannot apply to overturn a trial court judgment under the trial court's equitable powers since no valid claim would remain contrary to the reasoning of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) and it's prodigy.

Plaut and the concept of application of a retroactive change of law to any determination pending judicial review at any stage in the judicial department was not without exceptions, but require review by this Court for specifications on those exceptions whether it be through review of the merits or more specific to the circumstances raised herein. This Court's long-standing precedent respecting reliance upon stipulated facts should not be disturbed or excepted since such would disrupt the confidence in reliance thereon and thus overwhelm the entire judicial system into trying each and every fact in each and every case. The Oregon Court of Appeals failed to take this anomaly of conflicting positions into consideration in reliance on Oregon Supreme Court case law that was subject to differentiation from the instant matter, and the Oregon Supreme Court subsequently denied certiorari on the same basis.

A concession by stipulation to the liability for compensation for a specified claim should not be reachable as moot by application of a retroactive change of law, but should be an exception in the form of a waiver of such challenge by virtue of the stipulation itself. This Court should grant certiorari to reconcile the conflicting applicable law in this matter to determine whether the Oregon Court of Appeals erred in adopting an automatic mootness doctrine overturning a trial court judgment absent review of individual circumstances and merits of each case.

E. NEED FOR ADOPTION OF MANIFEST INJUSTICE EXCEPTION TO APPLICATION OF MOOTNESS DOCTRINE TO RETROACTIVE CHANGES OF LAW.

U.S. CONST. AMEND. XVI § 1 states, "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Plaut v. Spendthrift Farm, Inc.* states "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." *Ibid.*, 514 U.S. 211, 226-227, 115 S. Ct. 1447, 1457 (U.S. Ky.,1995); see *United States v. Schooner Peggy,* 1 Cranch 103, 2 L. Ed. 49 (1801); *Landgraf v. USI Film Products,* 511 U.S. 244, 273-280, 114 S. Ct. 1483, 1501-1505, 128 L. Ed. 2d 229 (1994). The 7th Circuit has acknowledged this Court's previous holding that applying a law retroactively such that it results in "manifest injustice" violates the Due Process Clause. *Jideonwo v. I.N.S.*, 224 F.3d 692, 697 (C.A.7 2000), *citing Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 716, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974). As the 7th Circuit explained, "[m]anifest injustice may occur where a new law changes existing rights or imposes unanticipated obligations on a party without providing appropriate notice." *Id.*, see *Bradley*, 416 U.S. at 720; *see also Landgraf*, 511 U.S. at 266.

Under *Eastern Enterprises v. Apfel*, this Court found that, "[r]etroactive legislation is generally disfavored ... because it can deprive citizens of legitimate expectations

and upset settled transactions." *Ibid.*, 524 U.S. 498, 501, 118 S. Ct. 2131, 2136 (U.S.Mass. 1998), *citing General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S. Ct. 1105, 1112, 117 L. Ed. 2d 328 (U.S. Mich. 1992).

In *Bradley v. School Bd. of City of Richmond*, this Court said:

> We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

The 9th Circuit has recently reiterated the Bradley test for retroactivity under *Oregon Natural Desert Ass'n v. Locke*, stating that, "[t]he *Bradley* test for whether a newly passed law should be given retroactive effect examines (1) whether the new law imposes new legal consequences for past conduct, (2) whether manifest injustice would occur by applying the new law, and (3) whether any contrary legislative history exists." *Ibid.*, 572 F.3d 610, 617 (C.A.9 (Or.) 2009), *citing Bradley*, 416 U.S. at 711-12, 94 S. Ct. 2006.

In the instant matter pursuant to Measure 37, a money judgment reflecting the trial court's final determination was entered for petitioners on December 5, 2007, prior to the December 6, 2007, effective date of Measure 49 at issue herein. Although Metro had stipulated to the facts of the case and the petitioners' entitlement to just compensation, it filed an appeal.

On June 24, 2009, after briefing and oral argument, the Court of Appeals filed its written opinion vacating petitioners' judgments and remanding them back to the trial court for a judgment of dismissal. In its determination of this matter, the Oregon Court of Appeals erroneously adopted an automatic reversal of the trial court judgments in any and all cases pertaining to Measures 37 (Chapter 1 Oregon Laws 2005), regardless of individual circumstances such as a valid and binding stipulation between the parties and absent any review whatsoever of the merits of the appeal to determine whether affirmance was appropriate to render the trial court judgment final.

Automatically applying the precepts of *Plaut* through the *English I* and *English II* Oregon cases has constitutional ramifications in this matter. Under existing opinions of the Court, there exists a question as to whether it is constitutional under the 14th amendment for the Legislature to deprive a landowner of a remedy for damages to property to be fixed under the existing statute. Applying a law retroactively such that it results in "manifest injustice," which "may occur where a new law changes existing rights or imposes unanticipated obligations on a party without providing appropriate notice" violates the Due Process Clause. *Jideonwo* at 697. It can also work to "deprive citizens of legitimate expectations and upset settled transactions" and is thus disfavored. *Apfel*, 524 U.S. at 501.

Petitioners were not placed on appropriate notice that the law affecting their rights under Measure 37 would be changing, nor that Measure 49's intent would be to deprive them altogether of any rights to just compensation for the restrictions placed upon their land by Metro

in the adoption into the urban growth boundaries as required by law. *Jideonwo* at 697. Petitioners maintained a legitimate expectation not only in Measure 37, but in Metro's concession and stipulation that the petitioners were entitled to just compensation therein, which petitioners considered a "settled transaction." *Apfel, supra.* Petitioners maintain no claim under the new Measure 49, unlike the claimants in *Corey* and *Cyrus*, upon which the Oregon Court of Appeals relied heavily in mooting the current matter. Thus, application of Measure 49 to moot the trial court judgment of just compensation to the petitioners in this matter evidences a "manifest injustice" requiring review by this Court.

Plaut and the Oregon cases of *English I* and *English II* appear to authorize actions taken in violation of a person's Due Process rights and resultant of a manifest injustice through a change of law affecting and extinguishing altogether their existing rights to just compensation. Neither *Plaut* nor *English I* or *II* discuss exceptions to such a rule, but their language also does not appear to prohibit the application of exceptions on individual case-by-case bases. The more stringent criteria of *Bradley*, however, seems to apply a "manifest injustice" exception that has not previously been addressed in *Plaut* or any other similar cases, although the 7th Circuit has opined as such in its retroactivity analysis contained in *Jideonwo, supra.*

This Court should grant certiorari in this matter to address the application of the *Bradley* factors in this case and for those similarly situated, who as Petitioners maintained a legitimate expectation in stipulations and in the application of existing law.

F. CLARIFICATION OF THE APPLICATION OF THE MOOTNESS DOCTRINE AS IT PERTAINS TO THIS COURT'S POSITION WITH RESPECT TO THE DISCRETIONARY APPLICATION OF EQUITABLE POWERS.

"Mootness doctrine" is a principle of judicial procedure whereby courts will not decide moot cases – that is, cases in which there is no longer any actual controversy.

However, the mootness doctrine is inapposite here. Under U.S. CONST. AMEND. V citizens are protected from "private property be[ing] taken for public use without just compensation." Application of the mootness doctrine in the instant case completely eliminates petitioners ability to receive just compensation, contrary to the holding of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

In *Munsingwear,* and it's prodigy, the Supreme Court has held that, where intervening mootness prevents appellate review of the underlying decision, the decision below should be vacated only where vacatur is equitable.

Vacatur falls within the Court's discretion. That discretion is governed by the use of equitable authority:

> "Equitable mootness doctrine," according to which courts dismiss appeals as "moot," is a pragmatic principle, grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable.

In re Fontainebleau Las Vegas Holdings, LLC 434 B. 716 (S.D. Fla., 2010).

Therefore, in the event that the court improperly vacates a case, thereby rendering relief impractical or unobtainable when vacatur is in equitable, it is an abuse of that court's equitable powers. The very fact that the Oregon Court of Appeals declared moot the appeal and ordered the trial court to vacate it's judgment – without ever reaching the merits of the case – represents a significant abuse of power and violates the court's responsibility in exercising its equitable authority.

In *Munsingwear, Inc.*, and it's prodigy this Court has addressed circumstances in which a case becomes moot while it is pending review by a higher court. A court can only overturn a case by reason of mootness due to a change in law and order vacatur in the event that final judgment is still pending *if* there is finding that vacatur is equitable. Thus, the Oregon Court of Appeals should have reached the merits of the appeal to determine if Metro raised any meritorious issues, because if it was determined that Metro's claims lacked merit, then the trial court judgment would be the final judgment of the judicial department, and the trial court judgment should be upheld. As such, petitioners herein would have a vested right in the judgment, which is protected from changes in legislative law.

Petitioners' property rights, evidenced in their judgments, existed before the Oregon Court of Appeals ordered vacatur.

More than disconcerting, it is repugnant to the principles of justice to completely extinguish the rights and claims of the petitioners to their judgments without considering the issues at hand. The fact that Metro was able to dismiss years of time and resources spent by petitioners in affronting their constitutionally protected property rights when it filed its notice of appeal is repugnant to the justice system because Respondent Metro had already stipulated to the facts and the viability of petitioners' claims. It is undisputedly inequitable to vacate the case without consideration to the years of resources and time invested developing substantive arguments – arguments that included facts to which Metro had stipulated before the trial court. Nevertheless, the Oregon Court of Appeals refused to even review whether the claims made in the Metro appeal were meritorious.

Courts are required to maintain impartiality in exercising discretion and in reviewing the substance of arguments, there are also procedural requirements to which they must adhere. Proper procedure with a change of law to uphold the preservation requirement would dictate that a post-judgment motion first be brought before the trial court. Instead, Metro was allowed to file only a notice of appeal which the Oregon Court of Appeals utilized to implement its erroneous automatic mootness absent specific inquiry into this case. Had Metro followed the proper procedure, the trial court would have had the opportunity to rule on the matter and petitioners would have been able to be heard on whether Measure 49 was being unconstitutionly applied to extinguish their claims.

"The very nature of an appeal is to challenge perceived errors in a lower court's rulings.

> To permit a party to circumvent proper procedures for review in this manner would ... case asunder congressionally [legislatively]-enacted procedures for review."

In re Motors Liquidation Co., 428 B.R. 43, 63 (S.D.N.Y. 2010). The refusal to consider the merits of the case is not only inequitable, the very vehicle by which the process occurred undermined the judiciousness of the case.

The cases of *Cyrus v. Board of County Com'rs of Deschutes County* and *Corey v. DLCD*, the two primary cases referenced as precedence by the Oregon Court of Appeals, can be distinguished by a subtle, yet substantial difference. In the cases of *Cyrus* and *Corey* the appellants' claims could still be remedied under Measure 49, and the appellants thereby retained their respective rights. In this case, however, Measure 49 annulled the possibility of petitioners refiling their claims under the new law. At the hearing before the Oregon Court of Appeals, in this case Richard Brenner, counsel for Respondent Metro said on the record, that Petitioners would have no rights under Measure 49. Again, such a dismissal represents a significant prejudice against petitioners and inequitable treatment at the hands of the Oregon Court of Appeals.

The unjustified application of the mootness doctrine to this case violates the Oregon Court of Appeals responsibility to use its powers equitably. By denying the constitutional right of just compensation under the existing law at the time the trial court determined the case based on the parties' stipulations, refusing to review the merits of the appeal, and failing to require proper procedure under either the preservation rule or mootness

doctrine, the Oregon Court of Appeals failed to meet its burden of rendering an equitable determination for petitioners.

CONCLUSION

For the reasons set forth above, Darrin Black, Roger J. Miracle, and Ann Miracle respectfully request that this court grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A — DECISON OF THE COURT OF APPEALS OF OREGON, DATED JUNE 24, 2009

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COURT OF APPEALS OF OREGON.

Nos. CV07050101, A137601 (Control), CV06080473, A137602, CV06110417, A137603, CV06120406, A137604.

June 24, 2009

229 Or.App. 210 (Or.App. 2009) 211 P.3d 302

Virginia Louise BLEEG,

Plaintiff-Respondent,

v.

METRO, a political subdivision of the State of Oregon,
Defendant-Appellant.

Darrin Black,

Plaintiff-Respondent,

v.

Metro, a political subdivision of the State of Oregon,

Defendant-Appellant.

Appendix A

Roger J. Miracle and Ann M. Miracle,

Plaintiffs-Respondents,

v.

Metro, a political subdivision of the State of Oregon,

Defendant-Appellant.

Harold S. MacLaughlan and Rebeca MacLaughlan,

Plaintiffs-Respondents,

v.

Metro, a political subdivision of the State of Oregon,

Defendant-Appellant.

Argued and Submitted on May 21, 2009.

Before HASELTON, Presiding Judge, and ARMSTRONG, Judge, and ROSENBLUM, Judge.

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Defendant Metro, a metropolitan service district, appeals corrected general judgments that awarded plaintiffs just compensation pursuant to ORS 197.352 (2005) (commonly

known as Measure 37).[1] On appeal, Metro raises three assignments of error concerning (1) the trial court's entry of its corrected general judgments *nunc pro tunc* to December 5, 2007-the day before Measure 49 became effective-to avoid the effect of the measure; (2) the trial court's conclusion that ORS 197.352 did not authorize Metro's " methods for determining whether its regulations reduced the fair market values of [plaintiffs'] properties"; and (3) the trial court's determination that Metro's "regulations had the effect of reducing the fair market values of [plaintiffs'] properties" and its corresponding awards of just compensation. Because we conclude that plaintiffs' cases were not justiciable after the enactment of Measure 49, we do not reach the merits of the assignments of error raised by Metro on appeal. Accordingly, we vacate the trial court's judgments and remand for entry of judgments dismissing plaintiffs' claims as moot.

The operative procedural facts are undisputed. Plaintiffs own properties that are subject to a Metro ordinance that (1) brought the properties into the regional

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1. To provide context for our discussion, Ballot Measure 37 (2004), which was codified as *former* ORS 197.352 (2005), *amended by* Oregon Laws 2007, chapter 424, section 4, *renumbered as* ORS 195.305 (2007), provided, generally, that public entities that enacted or enforced land use regulations that adversely affected the fair market value of a claimant's property either had to pay just compensation or waive the offending regulations. In 2007, the voters passed Ballot Measure 49, Oregon Laws 2007, chapter 424, which " extinguish[ed] and replace[d] the benefits and procedures that Measure 37 granted to landowners." *Corey v. DLCD*, 344 Or. 457, 465, 184 P.3d 1109 (2008). Throughout this opinion, all references to ORS 197.352 are to the 2005 version of that statute.

urban growth boundary, (2) designated the properties for industrial or urban residential development, and (3) applied a temporary 20-acre minimum lot size that would remain in place until the responsible local governments adopted comprehensive plan provisions governing urban development. Because of the effect of those regulations, plaintiffs, pursuant to [211 P.3d 304] ORS 197.352, filed written demands for just compensation with

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Metro. After Metro denied those claims for just compensation, plaintiffs filed actions in circuit court pursuant to ORS 197.352(6).[2]

Ultimately, on December 5, 2007, the trial court entered a general judgment that awarded plaintiffs just compensation in the amount of $14,818,158. The next day, on December 6, Measure 49 became effective. Then, on December 7, the trial court entered corrected general judgments that added a money award to the judgment

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2. ORS 197.352(6) provided:

"If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this section, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this section in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation."

for each plaintiff. Those judgments included a notation that they were *nunc pro tunc* to December 5.[3] Thereafter, Metro appealed.

The dispositive issue is whether plaintiffs' cases remain justiciable. As the Supreme Court stated in *Corey v. DLCD,* 344 Or. 457, 464, 184 P.3d 1109 (2008), " [i]f it becomes clear in the course of a judicial proceeding that resolving the merits of a claim will have no practical effect on the rights of the parties, this court will dismiss the claim as moot." In this court, the parties filed memoranda of additional authorities addressing the issue of justiciability-namely, whether the cases are moot. Plaintiffs cite *State ex rel English v. Multnomah County,* 227 Or.App. 419, 206 P.3d 224 (2009)(*English I*), in support of their argument that this matter is not moot. Specifically, plaintiffs contend that, as in *English I,* plaintiffs' Measure 37 claims for just compensation merged into the trial court's judgments; thus, this appeal does not concern pending Measure 37 claims, and we should resolve the merits of the issues raised on appeal. Metro counters that

" *English* [*I*] says a Measure 37 claim is extinguished ('merged' into the circuit court judgment) and not affected by Measure 49 after any right to appellate review has

3. Because we conclude that the trial court's judgments lacked continuing viability, we need not address the parties' arguments concerning the effect of the trial court's *nunc pro tunc* notation.

Appendix A

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expired. That is what happened in the *English* [*I*] case: Multnomah County voluntarily dismissed its appeal of a circuit court compensation judgment. In this case, * * * Metro filed a timely appeal of the circuit court compensation judgment, and that appeal is now before this court. There is no final judgment in this case.

" * * * Because there is no final judgment in this case, the circuit court judgment before the court *is* affected by passage of Measure 49. This court should remand this case to the circuit court with instructions to dismiss it as moot by passage of Measure 49."

(Footnote omitted; emphasis in original.) We understand Metro to contend that, because the corrected general judgments that are the subject of this appeal lacked continuing viability after the enactment of Measure 49, plaintiffs' cases are no longer justiciable and we should exercise our jurisdiction to make that determination and vacate the trial court's judgments and direct that court to dismiss plaintiffs' Measure 37 claims. We agree with Metro that, under the Supreme Court's and our case law, plaintiffs' cases are no longer justiciable.

Because it is the basis for the parties' contentions concerning justiciability, we begin by addressing the application of *English I* to this case. In *English I*, a landowner, English, obtained a judgment for just compensation against the defendant county. 227 Or.App. at 423, 206 P.3d 224. Although the county appealed

that compensation judgment, it ultimately dismissed its appeal. *Id.* Thereafter, the county refused to satisfy the compensation judgment, and English sought a writ of mandamus to compel payment. *Id.* at 424, 206 P.3d 224. After the trial court dismissed the alternative writ of mandamus, English appealed. *Id.* at 425, 206 P.3d 224.

[211 P.3d 305] In rejecting the county's contention that the appeal was moot in light of the passage of Measure 49, we summarized the case law addressing the effect of Measure 49 on the justiciability of pending appeals:

"In *Corey,* the Supreme Court examined the text and context of Measure 49 and determined that 'Measure 49 pertains to *all* Measure 37 claims, successful or not, and regardless of where they are in the Measure 37 process.'

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344 Or. at 465, 184 P.3d 1109 (emphasis in original). The court ultimately held that 'Measure 49 by its terms deprives Measure 37 waivers-and *all* orders disposing of Measure 37 claims-of any continuing viability.' *Id.* at 466-67, 184 P.3d 1109 (emphasis in original). Thus, because DLCD's order in that case had no continuing viability, a decision by the Supreme Court as to whether this court or a circuit court had jurisdiction to review the order could have had no practical effect on the parties and the case was moot.

" We recently applied *Corey* in *Cyrus v. Board of County Commissioners,* 226 Or.App. 1, 202 P.3d 274 (2009). In

Cyrus, the petitioners appealed a circuit court judgment essentially affirming an order of the Deschutes County Board of Commissioners that waived particular land use regulations. While the appeal was pending, Measure 49 became effective, and, like the Supreme Court in *Corey*, we were faced with determining whether the appeal was moot. The petitioners in *Cyrus* argued that our determination of the validity of the Measure 37 waiver would have a practical effect on the parties because it was a predicate to the argument that the waiver had vested under Measure 49. 226 Or.App. at 8, 202 P.3d 274. However, we concluded that the appeal was moot because, as the Supreme Court held in *Corey* Measure 49 deprived all orders disposing of Measure 37 claims of continued viability, and the validity of the waiver could be litigated in a Measure 49 proceeding. *Cyrus*, 226 Or.App. at 13, 202 P.3d 274."

English I, 227 Or.App. at 426-27, 206 P.3d 224.

Based on those cases, we reasoned in *English I* that, when the county dismissed its appeal from the compensation judgment, resulting in the issuance of the appellate judgment several months before the effective date of Measure 49, the county had exhausted any opportunity for appellate review. 227 Or.App. at 428, 206 P.3d 224. Accordingly, English had a judgment that (1) adjudicated her Measure 37 claim for just compensation long before the effective date of Measure 49 and (2) was not subject to judicial revision. *Id.* Under those circumstances, English's claim for just compensation merged into that judgment and was extinguished; thus, " English was left,

by way of the consequent 'merger' and 'substitution' with a final judgment and the right to enforce it." *Id.* (citation omitted). Ultimately, we concluded:

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"This appeal arose from English's enforcement activities-that is, English's attempts to compel the county to satisfy the compensation judgment by seeking a writ of mandamus. This is not an appeal concerning an existing Measure 37 claim. For that reason, our determination whether the county must pay the compensation judgment will have a practical effect on the rights of the parties. Consequently, the appeal is not moot."

Id.

We recently applied our holding in *English I* in a related case, *English v. Multnomah County,* 229 Or.App. 15, 209 P.3d 831 (2009)(*English II*). In *English II,* the county appealed the supplemental judgment that awarded English attorney fees, expenses, and costs under Measure 37. We noted that the county appeared to contend that, "because Measure 49 applies to all Measure 37 claims, the supplemental judgment that awarded English attorney fees and costs under Measure 37 is deprived of continuing viability" and rendered the appeal moot. *English II,* 229 Or.App. at 24, 209 P.3d 831.

We rejected that argument and concluded that the appeal was *not* moot. In so holding, we articulated a basic principle derived from *Corey* and *Cyrus* that was

the foundation of our holding in *English I:* "When the dispute involving a predicate Measure 37 claim for just compensation is ongoing (whether in another [211 P.3d 306] forum or on appeal), Measure 49 supersedes the Measure 37 claim and requires the parties to proceed under the new standards in Measure 49 to determine their rights." *English II,* 229 Or.App. at 26, 209 P.3d 831.

Applying that principle to this case, we conclude that plaintiffs' cases are not justiciable. Here, unlike in *English I* and *English II,* the dispute involving plaintiffs' Measure 37 claims for just compensation was ongoing as of the time that Measure 49 became effective-indeed that ongoing dispute about plaintiffs' Measure 37 claims for just compensation is the subject of this appeal. Thus, Measure 49 supersedes those Measure 37 claims and deprives the trial court's judgments in this case of continuing viability. *See Corey,* 344 Or. at 466-67, 184 P.3d 1109 (so holding). For that reason, any resolution by this court of the issues raised on appeal will have no practical effect on the parties. Accordingly, we conclude that plaintiffs' cases

are no longer justiciable. *Olson v. DLCD,* 220 Or.App. 77, 184 P.3d 1220 (2008) (vacating trial court's judgments and remanding case to trial court to enter a judgment dismissing the plaintiff's Measure 37 claim because the case was no longer justiciable after the enactment of Measure 49).

Judgments vacated; remanded for entry of judgments dismissing plaintiffs' claims.

APPENDIX B — GENERAL JUDGMENT AND MONEY AWARD IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF CLACKAMAS, DATED DECEMBER 5, 2007

IN THE CIRCUIT COURT OF THE
STATE OF OREGON FOR THE
COUNTY OF CLACKAMAS

Case No. CV06080473

DARRIN BLACK,

Plaintiff,

v.

METRO, a political subdivision of the State of Oregon,

Defendant.

CASE NO. CV06110417

ROGER and ANN MIRACLE,

Plaintiffs,

v.

METRO, a political subdivision of the State of Oregon,

Defendant.

Appendix B

CASE NO. CV07050101

VIRGINIA LOUISE BLEEG,

Plaintiff,

v.

METRO, a political subdivision of the State of Oregon,

Defendant.

CASE NO. CV07050190

LILA D. SAXON,

Plaintiff,

v.

METRO, a political subdivision of the State of Oregon

Defendant.

CASE NO. CV06120406

HAROLD S. MACLAUGHLAN
and REBECA MACLAUGHLAN,

Plaintiffs,

v.

METRO, a political subdivision of the State of Oregon,

Defendant.

Appendix B

GENERAL JUDGMENT AND MONEY AWARD

This matter coming before the Court on the stipulation of all parties after the parties had filed their cross Motions for Partial Summary Judgment, and after the Court had issued its opinion on November 2, 2007 granting Plaintiffs Black, Miracle, Bleeg, Saxon and MacLaughlan's Motions for Partial Summary Judgment as to the legal basis for determination of the reduction in fair market value; now therefore, based upon the Motion for Partial Summary Judgment and the attached stipulation of the parties, the Court enters the following findings:

1. The actions filed by the Plaintiffs were under provisions of ORS 197.352(6).

2. Defendant Metro had denied Plaintiffs' claims on the basis that Plaintiffs had no claims under ORS 197.352(1) on the basis that there had been no loss of value because of the passage and/or enforcement of Metro Ordinance No. 02-0969B.

3. Plaintiffs have established a right under ORS 197.352(6) to proceed with their claim for compensation.

4. All five Plaintiffs acquired their properties when their land was zone Residential-agricultural (RA-1), which allowed the creation of one-acre lots.[1]

---

1. Saxon sold on contract March 25, 1986 and received estoppel deed from purchaser on April 18, 1988.

5. Defendant Metro's Ordinance No. 02-979B added each of Plaintiffs' property to the Urban Growth Boundary ("UGB") and imposed 20 acre minimum parcel size after Plaintiffs acquired their properties.

6. Defendant's method of determining loss of fair market value fails to comply with the plain language of ORS 197.352.

7. Plaintiffs' submissions of their loss of fair market value (as commonly used in condemnation cases) based upon values of comparable properties, both with and without the METRO restriction and factoring in the zoning at the time of acquisition, is consistent with and satisfies the plain language of ORS 197.352.

8. Based upon the stipulations and submissions of the parties, the Court finds that the just compensation due Plaintiffs under their claims filed pursuant to ORS 197.352 is as follows:

a. In *Black v. Metro*, Case No. CV06080473, compensation in the amount of $1,580,000;

b. In *Miracle v. Metro*, Case No. CV06110417, compensation in the amount of $2,400,000;

c. In *Bleeg v. Metro*, Case No. CV07050101, compensation in the amount of $10,540,658;

d. In *Saxon v. Metro*, Case No. CV07050190, compensation in the amount of $255,000. (If Saxon's

ownership interest occurred June 8, 1965, compensation in the amount of $650,000); and

e. In *MacLaughlan v. Metro*, Case No. CV06120406, compensation in the amount of $297,500.

THEREFORE the court enters judgments as follows:

1. In *Black v. Metro*, Case No. CV06080473, judgment in the amount of $1,580,000, plus 9% interest per annum from August 26, 2005.

2. In *Miracle v. Metro*, Case No. CV06110417, judgment in the amount of $2,400,000, plus 9% interest per annum from February 1, 2006.

3. In *Bleeg v. Metro*, Case No. CV07050101, judgment in the amount of $10,540,658, plus 9% interest per annum from November 27, 2006.

4. In *Saxon v. Metro*, Case No. CV07050190, judgment in the amount of $255,000, plus 9% interest per annum from November 27, 2006.

5. In *MacLaughlan v. Metro*, Case No. CV06120406, judgment in the amount of $297,500, plus 9% interest per annum from July 19, 2005.

6. Costs and attorney fees shall be awarded pursuant to ORS 197.252 and ORCP 68.

DATED this 5th day of Dec., 2007

/s/
CIRCUIT COURT JUDGE

Submitted by:

Donald B. Bowerman, OSB No. 59011
Of Attorneys for Plaintiffs

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APPENDIX C — LETTER ORDER OF THE CIRCUIT COURT OF OREGON, DATED OCTOBER 12, 2007

LETTER ORDER OF CIRCUIT COURT OF OREGON

FIFTH JUDICIAL DISTRICT
CLACKAMAS COUNTY COURTHOUSE
807 MAIN STREET, ROOM 304
OREGON CITY, OREGON 97045

THOMAS J. RASTETTER
CIRCUIT COURT JUDGE

October 12, 2007

Donald B. Bowerman
Bowerman & Boutin, LLP
P.O. Box 100
Oregon City, OR 97045

Barton Bobbitt
Ambrose Law Group, LLC
222 SW Columbia Street, Suite #1670
Portland, OR 97201

Richard Benner
Office of Metro Attorney
600 NE Grand Avenue
Portland, OR 97232

Appendix C

Jeannette L. Moore
Law Offices of Ivan Karmel
1023 SW Yamhill Street, Suite #200
Portland, OR 97205

Re: Black v. Metro, No. CV06080473; Miracle v. Metro, No. CV06110417; Saxon v. Metro, No. CV07050090; Bleeg v. Metro, No. CV07050101; MacLaughlan v. Metro, No. CV06120406

Dear Counsel:

This matter came before the court on October 1, 2007 on the parties' cross motions for summary judgment. At that time the court heard the arguments of counsel and took the matter under advisement. This letter sets forth the court's findings and conclusions.

Background

These Measure 37 cases have been consolidated by stipulation of the parties and involve five separate parcels of land located in Clackamas County. All five of the claimants acquired their properties when the land was zoned Residential-Agricultural (RA-1), which allowed the creation of one-acre lots. On December 5, 2002 the Portland Area Metropolitan Service District ("Metro") adopted Ordinance No. 02-969B which added each of the five parcels to the Urban Growth Boundary *("UGB")* and imposed a temporary 20-acre minimum parcel size. Claimants Darrin Black ("Black"), Roger and Ann

Appendix C

Miracle ("Miracle"), Virginia Bleeg ("Bleeg"), and Harold and Rebeca MacLaughlan ("MacLaughlan") acquired their properties prior to their inclusion within the *UGB* and have maintained ownership of the properties since acquisition. Lila Saxon ("Saxon"), the fifth claimant, also acquired her property prior to Metro's ordinance, but then sold her property on a land sale contract on March 25, 1986. Saxon later re-acquired the property on April 18, 1988 by Estoppel Deed.

Each plaintiff has made Measure 37 claims to various governmental entities, including Metro. While some of the entities have waived their regulations, Metro has denied all of plaintiffs' claims. Plaintiffs have moved for summary judgment and asked for declaratory relief for Plaintiff Saxon. The defendant has made a cross motion for partial summary judgment.

Analysis:

Method for Determining Just Compensation under Measure 37

Both parties have moved for summary judgment on the issue of the proper method for determining "just compensation" under ORS 197.352 (2005). Plaintiffs believe the proper method compares the sales of similar properties both with and without the land restriction, keeping in mind the applicable zoning at the time of acquisition of the property. For example, if current regulations require a 20-acre minimum parcel size, and a property was zoned to allow one-acre lots at the time

the owner acquired it, plaintiffs base their valuations on the current difference in value between the 20-acre parcel as a whole and its value if divided into one-acre parcels.

Defendant has used different methods for its valuation. For the Black property defendant has based its valuation of the properties on the so-called "Plantinga-Jaeger Method", which is based on the economic Theory of Land Rent. In essence, this method takes the original sales price of a property and adjusts it to current value by using an appropriate price index. That value is then compared to the market worth of the property with the new regulation in place. In the other cases defendant has used the "time series variation of the Plantinga-Jaeger method", which dispenses with the need to apply an index to the original purchase price because of the availability of recent actual valuation data. That analysis looks at the "time series data" before and after the regulation to see if the property value was actually affected by Metro's regulation. *See* Conder memos in Appendices C, D, E, F and G. Under these analyses Metro has concluded that there was no reduction in the value of plaintiffs' properties. For the reasons outlined below, plaintiffs' motion for summary judgment on the determination of just compensation is granted and defendant's motion for partial summary judgment is denied.

Voters adopted Measure 37 by ballot initiative, so this court must look at the voters' intent to understand what is meant by "just compensation." The first step in this analysis is to refer to the text and context of the statute itself. *Roseburg School Dist. v. City of Roseburg*, 316 Or

374 (1993). Generally, we assume that voters intended the words in a statute to have their plain and ordinary meaning. *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 610-12 (1993). If however, well-defined legal terms are used in the statute, then those words are given their legal meaning. *Ester v. City of Monmouth*, 322 Or 1, 9 (1995) (citing *King v. City of Portland*, 2 Or 146, 154-55 (1865)). Finally, if the voters' intent is still unclear the court may consider the measure's history. *Ecumenical Ministries of Oregon v. Oregon State Lottery Commission*, 318 Or 551 (1994) (The history includes sources of information available to voters at the time of the adoption of the measure, which may include information in the voter's pamphlet, such as the ballot title, the explanatory statement, arguments for and against the measure. *Id* at 559, n. 8.).

Measure 37 allows the owner to be paid just compensation if a land use regulation enforced by a public entity restricts the use of and reduces the fair market value of real property. ORS 197.352(1). Section (2) of that statute states that:

> **Just compensation** shall be equal to the reduction in the **fair market value** of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this section. ORS 197.352(2) (emphasis added).

Both of the phrases 'just compensation" and "fair market value" are well-defined legal terms and are commonly used

to assess damages in condemnation cases. Typically, just compensation is measured by calculating the difference between the fair market value of the property before the taking and the fair market value of the property after the taking. *La Grande v. Rumelhart*, 118 Or 166, 176 (1926). "Fair market value" is further defined as the amount of money that a property would bring if offered for sale by an owner who was willing, but not obliged to sell, and purchased by a buyer who was willing, but not obliged to buy. *Dept. of Transportation v. Lundberg*, 312 Or 568, 574 *cert. denied*, 506 US 975 (1992). Since these terms are both well-defined and are ordinarily used for condemnation cases, it can be reasonably inferred that voters intended the language of the statute to have the same meaning that the terms have in condemnation cases.

Further analysis of the history of the provision supports the notion that the voters intended "just compensation" under Measure 37 to be evaluated in a manner similar to condemnation cases. Voters in the general election received a voter's pamphlet, outlining Measure 37, and it contained the ballot title, the text of the measure, an explanatory statement, arguments in favor, and arguments in opposition. In the "Summary" section of the ballot title of Measure 37, it informs voters that the Oregon Constitution requires the government to provide real property owners with 'just compensation" when it condemns or takes private property. It continues to state that Measure 37 will require local governments to either pay the owner the reduction in the fair market value of the affected property interest or forego enforcement of

the restriction.[1] This summary at the very least shows that voters contemplated a comparison between just compensation under Measure 37 and just compensation in takings and condemnation cases.

To further support the voters' intention, the chief petitioners of Measure 37 wrote an argument in favor attempting to clarify the compensation section of the ballot measure. The argument states,

> Through the normal condemnation process, the state government and local governments have an efficient statutory procedure already used to determine just compensation. The process is quick, clean, and extremely efficient and will be the basis for determining just compensation under Ballot Measure 37.[2]

This statement plainly demonstrates that voters would have understood Measure 37 to utilize the same legal framework as condemnation cases in evaluating "just compensation." Accordingly, the court will grant partial summary judgment to plaintiffs and deny defendant's claim for partial summary.

---

1. Secretary of State, *Voter's Guide to November 2, 2004 General Election, Measure 37, Ballot Title* http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_bt.html (accessed Oct. 5, 2007).

2. Secretary of State, *Voter's Guide to November 2, 2004 General Election, Measure 37, Arguments in Favor,* http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_fav.html(accessed Oct. 5, 2007).

Appendix C

The court will deny plaintiffs' motion for summary judgment on the amount of compensation due to the claimants. Plaintiffs have argued that an affirmation of their methodology for just compensation necessitates an entry of judgment for plaintiffs in the amount of their Measure 37 claims. However, even though the court has ruled on a proper method of valuation, there still remains a genuine issue of material fact because there is evidence before this court of property values from both parties. Plaintiffs have made claims for specific sums of money and defendant has countered that the values of plaintiffs' claims are zero. Because there is a genuine issue of material fact, plaintiffs' motion for summary judgment is denied.

Attorney Fees and Costs

It is not appropriate at this time to address the request for attorney fees or costs because we do not have a final outcome in each of these cases. Plaintiffs' motion for summary judgment on attorney fees and costs is denied.

Plaintiff Saxon's Motion for Declaratory Relief

Plaintiff Saxon has made a motion for declaratory relief asking the court to make a determination that she had a "continuous ownership interest" since June 8, 1965. That motion is denied for the reasons explained below.

Measure 37 applies to *present* owners of property or any interest therein. ORS 197.352(1); (11)(C). While undoubtedly Saxon had an interest in her property at

the time of the land sale contract, it was not an interest that Measure 37 has sought to protect. Section (1) of ORS 197.352 must be read in conjunction with Section (2), which provides:

> Just compensation shall be equal to the reduction in the fair market value **of the affected property interest** resulting from enactment or enforcement of the land use regulation .... ORS 197.352(2) (emphasis added).

When Saxon sold her property by land sale contract on March 25, 1986, she became a contract vendor with the right to receive payments under the contract. At that point Saxon was no longer an "owner" of the real property. Under her contract vendor status, her property interest would have been unaffected by the land use regulations imposed on the property because it would not have affected her right to receive the payments under the contract. Saxon remained a contract vendor until she re-acquired the property on April 18, 1988 by Estoppel Deed from the purchaser. At this point of acquisition Saxon became an owner of her property once again.[3]

Because Saxon was a contract vendor for a period of time, she was not a continuous "owner" of her property from

---

3. Since the doctrine of equitable conversion transforms a contract vendor's interest in a land sale contract to personal property, it is arguable that such an interest might not qualify as an interest in "real property" as required in ORS 197.352 (1). *Panushka v. Panushka*, 221 Or 145, 149 (1960). Because of my decision on other grounds, I do not need to decide that question.

Appendix C

June 8, 1965. Plaintiff's motion for summary judgment on the declaratory action is denied.

I would ask that Mr. Bowerman submit a form of order.

Very truly yours,

/s/_____
Thomas J. Rastetter
Circuit Court Judge

APPENDIX D — STIPULATED FACTS IN THE CIRCUIT COURT OF THE STATE OF OREGON, COUNTY OF CLACKAMAS, DATED AUGUST 31, 2007

IN THE CIRCUIT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

Case No. CV06080473

DARRIN BLACK,

Plaintiff,

v.

METRO, a political subdivision of the State of Oregon,

Defendant;

Case No. CV06110417

ROGER and ANN MIRACLE,

Plaintiffs,

v.

METRO, a political subdivision of the State of Oregon,

Defendant;

Appendix D

Case No. CV07050090

LILA D. SAXON,

Plaintiffs,

v.

METRO, a political subdivision of the State of Oregon,

Defendant;

Case No. CV07050101

VIRGINIA LOUISE BLEEG,

Plaintiffs,

v.

METRO, a political subdivision of the State of Oregon,

Defendant;

Case No. CV06120406

HAROLD S. MACLAUGHLAN and
REBECA MACLAUGHLIN,

Plaintiffs,

v.

METRO, a political subdivision of the State of Oregon,

Defendant.

Appendix D

STIPULATED FACTS

Plaintiffs and defendant have each filed Motions for Partial Summary Judgment and stipulate that there are no material issues of fact. The parties further stipulate the following:

Appendix D

1.

	BLACK	MIRACLE	BLEEG	SAXON	MACLAUGHLIN
Size of Property	12.8 ac.	11.34 ac.	117.6 ac.	6.84 ac.	5.85 ac.
Date of Acquisition	06/20/79	12/30/77	10/06/32[1]	06/08/65[3]	06/26/74
		06/02/80	07/03/75[2]	06/06/88[4]	
Zoning at Acquisition	----------All five properties RA-1 (allowed one-acre lots)				
Zoning at time of Metro Regulation	TBR[5]	RRFF-5[6]	TBR	RRFF-5	RRFF-5
Metro Land Use Designation	IN[7]	IN	IN	IN	RSIA[8]
Property Within City of Damascus	Yes	Yes	Yes	Yes	No

1. Father of claimant.
2. First acquisition.
3. Claimant.
4. Second acquisition by Estoppel Deed, following contract sale to Cheryl Olin and default.
5. Timber, 80-acre minimum parcel size (Clackamas County).
6. Rural Residential Farm-Forest-5, five-acre minimum lot size Clackamas County.
7. Inner Neighborhood, urban density residential use.
8. Regionally Significant Industrial Area.

2.

On December 5, 2002, by Ordinance No. 02-969B, effective date, Metro added the subject properties to the Urban Growth Boundary ("UGB") and imposed a temporary 20-acre minimum parcel size on all land added to the UGB, including subject properties (expires upon adoption by the City of Damascus or Clackamas County of new comprehensive plan provisions and land use regulations) under Metro Code 3.07.1110.

3.

Neither the City of Damascus nor Clackamas County has yet adopted new comprehensive plan provisions or land use regulations to allow urban development of plaintiffs' properties.

4.

Plaintiffs Black, Miracle, Bleeg and Saxon submitted claims under ORS 197.352 to the City of Damascus or Clackamas County (MacLaughlan only) and obtained "waivers" of the respective city and county regulations from those local governments. The State of Oregon entered orders denying plaintiffs' Black, Bleeg, and MacLaughlin claims for the reason that the properties are no longer subject to the state regulations that were the basis of the claims, having been added to the UGB. The state approved the claim filed by Plaintiff Miracle.

Appendix D

5.

Plaintiffs submitted claims in the following amounts on the following dates, all of which were accepted, reviewed and denied by the Metro Council:

a. *Black*:

i. Date Filed: August 26, 2005

ii. Amount of Claim: $1,580,000

iii. Date Denied: June 1, 2006

b. *Miracle*:

i. Date Filed: February 1, 2006

ii. Amount of Claim: $2,4000,000

iii. Date Denied: August 17, 2006

c. *Bleeg*:

i. Date Filed: November 27, 2006

ii. Amount of Claim: $10,540,658

iii. Date Denied: March 22, 2007

d. *Saxon*:

i. Date Filed: November 28, 2006

ii. Amount of Claim: $444,661.43

iii. Date Denied: March 22, 2007

e. *MacLaughlin*:

i. Date Filed: July 19, 2005

ii. Amount of Claim: $1,299,329

iii. Date Denied: July 20, 2006

Dated this 31st day of August, 2007.

Respectfully submitted,

/s/

Richard P. Benner, OSB #75037
OFFICE OF METRO ATTORNEY
600 NE Grand Avenue
Portland, Oregon 97232-2736
Of Attorneys for defendant Metro

APPENDIX E — ORDER DENYING REVIEW IN THE SUPREME COURT OF OREGON, DATED SEPTEMBER 17, 2010

IN THE SUPREME COURT
OF THE STATE OF OREGON

VIRGINIA LOUISE BLEEG,

Plaintiff-Respondent,
Petitioner on Review,

v.

METRO, a political subdivision of the State of Oregon,

Defendant-Appellant,
Respondent on Review.

A137601 (Control)

DARRIN BLACK,

Plaintiff-Respondent,
Petitioner on Review,

v.

METRO, a political subdivision of the State of Oregon,

Defendant-Appellant,
Respondent on Review.

A137602

Appendix E

ROGER J. MIRACLE and ANN M. MIRACLE,

Plaintiffs-Respondents,
Petitioners on Review,

v.

METRO, a political subdivision of the State of Oregon,

Defendant-Appellant,
Respondent on Review.

A137603

HAROLD S. MACLAUGHLAN and
REBECA MACLAUGHLAN,

Plaintiffs-Respondents,
Petitioners on Review,

v.

METRO, a political subdivision of the State of Oregon,

Defendant-Appellant,
Respondent on Review.

A137604

Court of Appeals
A137601 (Control)

Appendix E

S057909

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

September 17, 2010 /s/_____
DATE CHIEF JUSTICE

*Walters, J., not participating

APPENDIX F — ORDER DENYING PETITION FOR RECONSIDERATION IN THE SUPREME COURT OF OREGON, DATED DECEMBER 9, 2010

IN THE SUPREME COURT
OF THE STATE OF OREGON

VIRGINIA LOUISE BLEEG,

Plaintiff-Respondent,
Petitioner on Review,

v.

METRO, a political subdivision of the State of Oregon,

Defendant-Appellant,
Respondent on Review.

A137601 (Control)

DARRIN BLACK,

Plaintiff-Respondent,
Petitioner on Review,

v.

METRO, a political subdivision of the State of Oregon,

Defendant-Appellant,
Respondent on Review.

A137602

Appendix F

ROGER J. MIRACLE and ANN M. MIRACLE,

Plaintiffs-Respondents,
Petitioners on Review,

v.

METRO, a political subdivision of the State of Oregon,

Defendant-Appellant,
Respondent on Review.

A137603

HAROLD S. MACLAUGHLAN and
REBECA MACLAUGHLAN,

Plaintiffs-Respondents,
Petitioners on Review,

v.

METRO, a political subdivision of the State of Oregon,

Defendant-Appellant,
Respondent on Review.

A137604

Appendix F

Court of Appeals
A137601

S057909

ORDER DENYING PETITION FOR RECONSIDERATION

Upon consideration by the court.

The court has considered the petition for reconsideration and orders that it be denied.

December 9, 2010
DATE

/s/
CHIEF JUSTICE

c: Barton C Bobbitt
Richard P Benner
Jeannette L Moore

APPENDIX G — OREGON LAWS 2005, RELEVANT PORTIONS OF BALLOT MEASURE 37

CHAPTER 1

The following provisions are added to and made a part of ORS chapter 197 [Ballot Measure 37]:

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this act.

(3) Subsection (1) of this act shall not apply to land use regulations:

(A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this act;

(B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and

building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;

(C) To the extent the land use regulation is required to comply with federal law;

(D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or

(E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

(4) Just compensation under subsection (1) of this act shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

(5) For claims arising from land use regulations enacted prior to the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the effective date of this act, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims

arising from land use regulations enacted after the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

(6) If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this act, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this act in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation.

(7) A metropolitan service district, city, or county, or state agency may adopt or apply procedures for the processing of claims under this act, but in no event shall these procedures act as a prerequisite to the filing of a compensation claim under subsection (6) of this act, nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim under subsection (6) of this act.

(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this act, in lieu of payment of just compensation under this act, the

governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

(9) A decision by a governing body under this act shall not be considered a land use decision as defined in ORS 197.015(10).

(10) Claims made under this section shall be paid from funds, if any, specifically allocated by the legislature, city, county, or metropolitan service district for payment of claims under this act. Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this act. If a claim has not been paid within two years from the date on which it accrues, the owner shall be allowed to use the property as permitted at the time the owner acquired the property.

(11) Definitions - for purposes of this section:

(A) "Family member" shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or

combination of these family members or the owner of the property.

(B) "Land use regulation" shall include:

(i) Any statute regulating the use of land or any interest therein;

(ii) Administrative rules and goals of the Land Conservation and Development Commission;

(iii) Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances;

(iv) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and

(v) Statutes and administrative rules regulating farming and forest practices.

(C) "Owner" is the present owner of the property, or any interest therein.

(D) "Public entity" shall include the state, a metropolitan service district, a city, or a county.

(12) The remedy created by this act is in addition to any other remedy under the Oregon or United States Constitutions, and is not intended to modify or replace any other remedy.

(13) If any portion or portions of this act are declared invalid by a court of competent jurisdiction, the remaining portions of this act shall remain in full force and effect.

The Act set forth above (Ballot Measure No. 37) was proposed by initiative petition and was approved by the voters at the regular general election on November 2, 2004. By the proclamation of the Governor dated December 2, 2004, the Act was declared to have received an affirmative majority of the total number of votes cast thereon and to be in full force and effect as provided in section 1, Article IV, Oregon Constitution. Effective date December 2, 2004.

APPENDIX H — OREGON LAWS 2007, RELEVANT PORTION OF BALLOT MEASURE 49

LEGISLATIVE POLICY ON FAIRNESS TO PROPERTY OWNERS

SECTION 3. (1) The Legislative Assembly finds that:

(a) In some situations, land use regulations unfairly burden particular property owners.

(b) To address these situations, it is necessary to amend Oregon's land use statutes to provide just compensation for unfair burdens caused by land use regulations.

(2) The purpose of sections 5 to 22 of this 2007 Act and the amendments to Ballot Measure 37 (2004) is to modify Ballot Measure 37 (2004) to ensure that Oregon law provides just compensation for unfair burdens while retaining Oregon's protections for farm and forest uses and the state's water resources.

BALLOT MEASURE 37

SECTION 4. ORS 197.352 is amended to read:

197.352. [*The following provisions are added to and made a part of ORS chapter 197:*]

(1) If a public entity enacts [*or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts*] **one or more**

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land use regulations that restrict the **residential** use of private real property or [*any interest therein*] **a farming or forest practice** and [*has the effect of reducing*] **that reduce** the fair market value of the property, [*or any interest therein,*] then the owner of the property shall be [*paid just compensation*] **entitled to just compensation from the public entity that enacted the land use regulation or regulations as provided in sections 12 to 14 of this 2007 Act.**

(2) Just compensation **under sections 12 to 14 of this 2007 Act** shall be [*equal to*] **based on** the reduction in the fair market value of the [*affected*] property [*interest*] resulting from [*enactment or enforcement of*] the land use regulation [*as of the date the owner makes written demand for compensation under this section*].

(3) Subsection (1) of this section shall not apply to land use regulations **that were enacted prior to the claimant's acquisition date or to land use regulations**:

[*(A)*] **(a)** Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law[. *This subsection shall be construed narrowly in favor of a finding of compensation under this section*];

[*(B)*] **(b)** Restricting or prohibiting activities for the protection of public health and safety[, *such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations*];

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[*(C)*] **(c) To the extent the land use regulation is required to comply with federal law; or**

[*(D)*] **(d) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing.** [*Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or*]

[*(E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.*]

[*(4) Just compensation under subsection (1) of this section shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.*]

[*(5) For claims arising from land use regulations enacted prior to December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of December 2, 2004, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of the enactment of the land use*

regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.]

[*(6) If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this section, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this section in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation.*]

(4)(a) Subsection (3)(a) of this section shall be construed narrowly in favor of granting just compensation under this section. Nothing in subsection (3) of this section is intended to affect or alter rights provided by the Oregon or United States Constitution.

(b) Subsection (3)(b) of this section does not apply to any farming or forest practice regulation that is enacted after January 1, 2007, unless the primary purpose of the regulation is the protection of human health and safety.

(c) Subsection (3)(c) of this section does not apply to any farming or forest practice regulation that is enacted after January 1, 2007, unless the public entity enacting the regulation has no discretion under federal law to decline to enact the regulation.

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[*(7)*] **(5)** A [*metropolitan service district, city, or county, or state agency*] **public entity** may adopt or apply procedures for the processing of claims under [*this section, but in no event shall these procedures act as a prerequisite to the filing of a compensation claim under subsection (6) of this section, nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim under subsection (6) of this section*] **sections 12 to 24 of this 2007 Act.**

[*(8)*] **(6)** [*Notwithstanding any other state statute or the availability of funds under subsection (10) of this section, in lieu of payment of just compensation under this section, the governing body responsible for enacting*] **The public entity that enacted** the land use regulation [*may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property*] **that gives rise to a claim under subsection (1) of this section shall provide just compensation as required under sections 12 to 24 of this 2007 Act.**

[*(9)*] (7) A decision by a [*governing body under this section shall not be considered a*] **public entity that an owner qualifies for just compensation under sections 5 to 22 of this 2007 Act and a decision by a public entity on the nature and extent of that compensation are not** land use [*decision as defined in ORS 197.015 (11)*] **decisions.**

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[(10) Claims made under this section shall be paid from funds, if any, specifically allocated by the legislature, city, county, or metropolitan service district for payment of claims under this section. Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this section. If a claim has not been paid within two years from the date on which it accrues, the owner shall be allowed to use the property as permitted at the time the owner acquired the property.]

[(11) Definitions - for purposes of this section:]

[(A) "Family member" shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property.]

[(B) "Land use regulation" shall include:]

[(i) Any statute regulating the use of land or any interest therein;]

[(ii) Administrative rules and goals of the Land Conservation and Development Commission;]

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[*(iii) Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances;*]

[*(iv) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and*]

[*(v) Statutes and administrative rules regulating farming and forest practices.*]

[*(C) "Owner" is the present owner of the property, or any interest therein.*]

[*(D) "Public entity" shall include the state, a metropolitan service district, a city, or a county.*]

[*(12)*] **(8)** The [*remedy*] **remedies** created by [*this section is*] **sections 5 to 22 of this 2007 Act are** in addition to any other remedy under the Oregon or United States [*Constitutions*] **Constitution,** and [*is*] **are** not intended to modify or replace any [*other*] **constitutional** remedy.

[*(13)*] **(9)** If any portion or portions of this section are declared invalid by a court of competent jurisdiction, the remaining portions of this section shall remain in full force and effect.

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No. 10-1241

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DARRIN BLACK,

Petitioner,

v.

METRO, a political subdivision of the State of Oregon,

Respondent.

ROGER J. MIRACLE and ANN M. MIRACLE,

Petitioners,

v.

METRO, a political subdivision of the State of Oregon,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

BRIEF OF RESPONDENTS VIRGINIA LOUISE BLEEG, HAROLD S. MACLAUGHLAN AND REBECA MACLAUGHLAN IN SUPPORT OF PETITION

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INTRODUCTION

In *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592, 177 L.Ed.2d 184 (2010), the Supreme Court recognized the concept of judicial taking. The issue in that case was resolved in favor of the state because the Supreme Court of Florida did not render a decision that took a legal right plaintiffs had prior to the Florida Supreme Court' s *Stop the Beach Renourishment, Inc.* decision.

In *Stop the Beach* Justice Kennedy and Justice Sotomayor recognized a decision which worked an unpredictable result without a right of review can be a violation of the Due Process Clause. See concurring opinion of Justice Kennedy joined by Justice Sotomayor.

However, one must acknowledge a taking of Petitioners' judgments occurred in this case because the Oregon Court of Appeals created an unpredictable change of long standing law without notice and affording a opportunity of review.

> [t]o the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Hughes v. Washington, 389 U.S. 290, 296-97, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967)

In the instant case (*Bleeg*), the Oregon Court of Appeals did exactly that which the court recognized as prohibited. The Oregon Court of Appeals violated the taking clause when it ordered remand with instructions to vacate the judgment in *Bleeg* without affording petitioners a proceeding where the correctness of the judgment could be inquired into contrary to the long standing precedent in *Warner v. Myers*, 4 Or. 72, 77 (1871)

> "the correctness of its decision cannot be inquired into in this proceeding. Its decision, although erroneous in point of law or fact, must stand until reversed and set aside by a competent tribunal, and in a proceeding where its correctness may be inquired into. . . . . The fact that an appeal has been taken does not affect the conclusive nature of the decision while it remains unrevised."

Here, as in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Oregon Court of Appeals has engaged in the constitutionally repugnant pattern of "adopting novel procedures" to deny petitioners and other persons who file claims under Measure 37 (*former* ORS 197.352) full judicial review. The Oregon Court of Appeals has also engaged in the repugnant act of taking fundamental rights by "denying they ever existed" a constitutional abridgment identified by justice Stewart in his concurring opinion in

Hughes v. Washington, 389 U.S. 290, 297, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967)

The Oregon Court of Appeals violated the Due Process clause when it applied Measure 49 retroactively in spite of no evidence showing a legislative intent to support retroactive application.

The Oregon Court of Appeals further violated the Due Process clause when it misapplied the analysis of *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S. Ct. 1447 (U.S. Ky. 1995), which allows retroactive application only when there is *express* legislative intent of retroactivity and inequitable consequens do not result. *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed.2d 229 (1994); *Jideonwo v. Immigration and Naturalization Service*, 224 F.3d 692 (7th Cir. 2000)).

REASONS FOR GRANTING THE PETITION

I. If allowed to stand, this decision would enable Oregon's Judiciary to violate due process rights by vacating any disfavored judgment of a trial court without notice; an opportunity for review or a finding of error.

> The Due Process Clause protects against "unpredictable Change in State Law"

Hughes v. Washington, 389 U.S. 290 at 297.

> Oregon law has long provided "[A decision] must stand until reversed and set aside by a competent tribunal, and in a proceeding where its correctness may be inquired into.

See Warner v. Myers, 3 OR 218 (1870).

This decision if allowed to stand would eliminate the right to expect courts to follow the law in violation of the Due Process Clause.

II. The Oregon Court of Appeals lacked subject matter jurisdiction due to failure by Metro to preserve the issue at the trial court level.

"A litigant generally may raise a court's lack of subject matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance." *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 576, 124 S. Ct. 1920, 1927, 158 L.Ed.2d 866 (U.S. 2004), *citing Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 157 L.Ed.2d 867 (2004).

The U.S. Supreme Court has determined appellate courts must adhere to procedural requirements in preserving a claim for appeal.

One such procedural requirement restricting the power and jurisdiction of a court of appeals pertains to preservation of issues. To preserve a claim for appeal, "the claim must have been raised at the earliest opportunity and preserved at each step of the judicial process." *State v. Stottlemyre*, 35 S.W.3d 854, 861 (Mo. App. 2001) (*quoting State v. Sumowski*, 794 S.W.2d 643, 647 (1990)).

In *Thomas v. Arn, infra*, the Supreme Court reviewed the Sixth Circuit's decision requiring that issues and objections must first be brought before the trial court in order to qualify for appellate review.

> The Sixth Circuit's decision to require the filing of objections is supported by sound considerations of judicial economy. The filing of objections to a [judge's] report enables the district judge to focus attention on those issues-factual and legal-that are at the heart of the

> parties' dispute.... The Sixth Circuit's rule, by precluding appellate review of any issue not contained in objections, prevents a litigant from "sandbagging" the district judge by failing to object and then appealing.

Thomas v. Arn, 474 U.S. 140, 146-148, 106 S. Ct. 466, 470-471 (U.S. Ohio, 1985).

This would force the court of appeals to consider claims that were never reviewed by the district court. Such a result would be an inefficient use of judicial resources. Further explanation of the reasoning behind the Supreme Court's opinion and support for the Sixth Circuit's judgment is found in *U.S. v. Schronce*: "Litigants would have no incentive to make objections at the trial level; in fact they might even be encouraged to bypass the district court entirely." *Ibid.*, 727 F.2d 91, 94 (C.A.N.C., 1984).

In the present matter, proper procedure to uphold the preservation requirement would dictate that a post-judgment motion first be brought before the trial court. Instead, Metro was allowed to file only a notice of appeal, which the Oregon Court of Appeals used to support its erroneous ruling of automatic mootness absent specific inquiry into this case. If Metro had concerns resulting from post-judgment changes in legislation, they should have submitted a post-judgment issue. But they did not. Instead, in a realization of the very fears expressed by the Supreme Court, Metro "sandbagged" the trial court and "bypassed" it entirely.

The proper standard of review for retroactive applications of law is correctness review, yet was simply unavailable to the Oregon Court of Appeals because

the trial court had never heard the issue. As such, the Court of Appeals had no right to review an issue that was not preserved below. Indeed, as implied by *Johnson v. Frederick and Lewis Timber and Equipment Co.*, 181 F.3d 101 (6th Cir. 1999), preservation is how the appellate court obtains jurisdiction, and, "if the district court lacked subject matter jurisdiction," the underlying judgment is void.

The Oregon Court of Appeals clearly violated the due process clause by holding a hearing ostensibly to review the trial court's decision but, instead of reviewing the record, treated petitioner's cause of action *void ab initio* and issued a vacatur — leaving petitioners with nothing. Hold Metro followed the proper procedure, the trial court would have had the opportunity to rule on the matter, and petitioners would have been able to be heard on whether Measure 49 was being unconstitutionally applied to extinguish their claims.

> The very nature of an appeal is to challenge perceived errors in a lower court's rulings. To permit a party to circumvent proper procedures for review in this manner would . . . cast asunder congressionally-enacted procedures for review.

In re Motors Liquidation Co., 428 B.R. 43, 63 (S.D.N.Y. 2010).

III. The treatment of petitioners and all Measure 37 claimants at the hands of the Oregon Court of Appeals is repugnant to the U.S. Constitution.

The due process protections of the 5th and 14th Amendments are protections categorically against state action. Those protections are not simply limited to executive or legislative actions. The U.S. Constitution, as interpreted and applied by the federal courts, is a protection against all forms of state action, including those undertaken in its judiciary. Supreme Court jurisprudence has specifically identified judicial taking as a form of taking that is equally prohibited by the 5th Amendment. (*See Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592, 177 L.Ed.2d 184 (2010).)

Accordingly, this Court, while giving appropriate consideration to the opinions of the state's judicial department, should keep in mind that the state courts may be a contributing party to the ultimate taking at issue.

The seminal case in the Oregon Supreme Court regarding this Measure 37 - Measure 49 conflict relied on by the Oregon Court of Appeals in *Bleeg* is illustrative. In *Corey v. DLCD*, 344 Or. 457 (2008), the plaintiff Corey objected to a proposed finding of the Court upon federal Constitutional grounds which were preserved, but the Oregon Supreme Court declined to consider the constitutionality of its proposed ruling, finding that the constitutionality of its own action was not an issue properly before the Court. This conclusion would seem to raise issues of whether the U.S. Constitution is the supreme law of the land.

The recent decisions of the Oregon Court of Appeals and its treatment of issues raise serious questions. The decision in this case is the result of a pattern of the Oregon Court of Appeals failing to follow maxims of law. In this and some other related cases, the Oregon Court of Appeals has engaged in systematic adoption of positions exactly contrary to earlier decisions without addressing the incongruity and conflict thereby created. In some cases, there is a blatant avoidance of issues. In *all* cases, the effect, regardless of means, is to protect and preserve the state's taking without compensating. This case illustrates the Oregon Court of Appeals' pattern of ignoring any precedential law that happens to be contrary. In *Warner v. Myers*, 3 Or. 218 (1870), the opinion of the Circuit Court was, "When a tribunal or board, no matter how inferior its jurisdiction, or limited its power, proceeds within its jurisdiction and determines a matter which it is authorized by law to decide, its decision, even if erroneous, is binding until it is reversed." (*Id.* at 224.). In affirming the decision on appeal in *Warner v. Myers*, 4 Or. 72, 77 (1871), the Court said,

> "It was the duty of that board to decide the question in the first instance, and the correctness of its decision cannot be inquired into in this proceeding. Its decision, although erroneous in point of law or fact, must stand until reversed and set aside by a competent tribunal, and in a proceeding where its correctness may be inquired into..... The fact that an appeal has been taken does not affect the conclusive nature of the decision while it remains unrevised."

The courts of Oregon with their wholesale application of the new found mootness doctrine are ignoring the due process obligation to adhere to the settled maxims of law which is the bedrock of *stare decisis.*[11]

This case stands as another excellent example of the Court of Appeals going outside the confines of due process by ignoring the settled maxims of law bound up in the doctrine of *stare decisis* and fabricating a rationale to justify an end.

IV. The Bleeg decision repugnant to the equal protection clause

Under the equal protection clause, in the absence of heightened review of a fundamental right, the standard is whether the alleged discrimination rationally furthers a legitimate state purpose. As in the present proceeding, the very important and significant question is whether property, particularly in the form of a valid judgment for compensation, involves a fundamental right. The Petitioners humbly ask this Court to examine the way the Oregon Court of Appeals has, by its decision here

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1. The line of cases consistently prohibiting the retrospective cancellation of validated and accrued claims for compensation, be they statutory claims, contracts or judgments, has a lineage exceeding 200 years. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796); *Fletcher v. Peck*, 3 U.S. 162 (1810); *Pacific Mail Steamship Co. v. Joliffe*, 69 U.S. 805 (1864); *Pritchart Ex'x v. Norton*, 106 U.S. 124 (1882); *Ettor v. City of Tacoma*, 228 U.S. 148 (1913); *Graham v. Goodcell*, 282 U.S. 409 (1931); *Coombes v. Getz*, 285 U.S. 434 (1932); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); and *American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

created a contradiction with earlier precedent in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) and *American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

V. The Oregon Court of Appeals violated the due process clause when it applied Measure 49 retroactively to eliminate petitioners' causes of action.

Measure 49, amended, *but did not repeal, former* ORS 197.352 (Ballot Measure 37 (2004), renumbered as ORS 195.305 by Measure 49; hereinafter "ORS 197.352"). The "cause of action" was not eliminated anywhere in Measure 49, including Section 5, which applies to "claims," and the disparate meanings for a "claim" and a "cause of action" were not considered by the Court of Appeals.

The cause of action for compensation under ORS 197.352(6) continues to be available as supported by the text of Measure 49, which merely amended Measure 37. Petitioners argued at both the trial court and appellate court level that Measure 49 has no effect on a "cause of action" for compensation that concluded with entry of a judgment prior to the effective date of Measure 49, and that their cases remain justiciable.

The Court of Appeals, however, avoided any statutory interpretation, ignoring the methodology for statutory construction set forth by *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610, 859 P.2d 1143 (1993), ORS 174.020 and this Court's recent decision in *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009). Specifically, the Court of Appeals summarily held that the petitioners' cases were

not justiciable because the "ongoing dispute" involved "Measure 37 claims for just compensation" and because "Measure 49 supersedes those Measure 37 claims and deprives trial court's judgments in this case of continuing viability."

The Court mischaracterized the holding in *Corey, supra*, by extending the interpretation of Measure 49's effect on Measure 37 claims to include extinguishment of judgments and "causes of action" for compensation under ORS 197.352(6). The Court of Appeals reached that conclusion without applying any of the well-established principles of statutory interpretation.

In holding that "Measure 49 by its terms deprives Measure 37 waivers — and all orders disposing of Measure 37 claims — of any continued viability . . .", *Corey, supra*, at 466-67, the Court of Appeals limited its interpretation to Measure 49's effect on "claims." the language in Section 5 of Measure 49 as follows:

"A claimant that filed a claim under ORS 197.352 [Ballot Measure 37 (2004)] on or before that date or adjournment sine die of the 2007 regular session of the Seventy-fourth Assembly is entitled to just compensation as provided in..."

Id. at 463.

This Court's holding in *Corey, supra*, was erroneously expanded by the Court of Appeals to include judgments entered upon causes of action, which are at issue here. That interpretation is wholly unsupported by the text of Measure 49.

It is repugnant to the Constitution to apply Measure 49 retroactively.

The Court of Appeals also failed to address the continued viability of ORS 197.352 until Measure 49 became effective and specifically whether any changes to Measure 37 causes of actions were prospective rather than retroactive. In multiple sections, Measure 49 plainly provides for the ongoing viability and availability of the cause of action for compensation under subsection (6) of ORS 197.352 "as immediately in effect before the effective date of [Measure 49]." For example, Measure 49 (codified at ORS 195.305 Section 11(8)) specifically provides that when relief has been claimed under sections 5 to 11 [of Measure 49]:

> (a) Additional relief is not due; and
>
> (b) An additional claim may not be filed, compensation is not due and a waiver may not be issued with regard to the property under [Measure 37] as in effect immediately before December 6, 2007 [the effective date of Measure 49] . . .

This plain language provides that when relief is not claimed under Measure 49, compensation is still due under Measure 37.

What the voters voted on in Measure 37 was not repealed, only prospectively amended. "[A] repeal of an element of a civil cause of action may not be done through innuendo, but may be done only through explicit legislation." *Brown v. Vogt*, 272 Or. 482, 483-95, 538 P.2d 362 (1975).

Further support for the determination that Measure 49's elimination of the "cause of action" in ORS 197.352(6) is only prospective is found in section 4 of Measure 49.

"[A] party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it," *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009), as the courts ordinarily presume that the legislature intended terms to have their plain, natural, and ordinary meanings.

In this case, the Court of Appeals failed to do any analysis to determine if Measure 49 expressed an intent to abolish causes of action, including the required analysis set forth in *State v. Lanig*, 154 Or. App. 665, 963 P.2d 58 (1998), which states that there must be a rational basis or means in support of abolishing the causes of action retroactively. Conspicuously absent is any language retroactively applying the amendments in ORS 197.352 to repeal a pre-existing "cause of action."

"Unless the legislature expressly provides that a statute applies retroactively, the general rule is that the rights and liabilities of a person who is affected by an event are defined and measured by the statutes in effect at the time of the event." *Barnes v. City of Portland*, 120 Or. App. 24, 852 P.2d 265, *Petition for Review Denied* 317 Or. 583 (1993), *citing Whipple v. Howser*, 291 Or. 475, 632 P.2d 782 (1981). The judgments on appeal, then, should be reviewed based on the law in effect at the time they were entered (*former* ORS 197.352) and not on Measure 49. "In the face of competing constructions of an enactment, we generally are required to "choose the interpretation which will avoid any **serious** constitutional difficulties." *Lanig, supra*, 154 Or. at 674 (*citing State v. Duggan*, 290

Or. 369, 373, 622 P.2d 316 (1981)); *see also State v. Meyers*, 153 Or. App. 551, 560, 958 P.2d 187 (1998).

Furthermore, insertion of a provision to abolish judgment entered pursuant to Measure 37 cause of action is considered judicial legislation and would amount to a judicial amendment of the statute ex post facto. *See Caldwell v. Wunderlich*, 26 Or. App. 407, 552 P.2d 1321 (1976) (*citing State v. LaFollett*, 132 Or. 257, 284 P.283 (1930)).

In Measure 49, there is no express intent to abolish a cause of action and no expressed intent to stripping petitioners of all relief.

Petitioners' judgments should remain justiciable and be reviewed, on appeal, under the law in effect at the time they were entered.

A. Retroactive application of Measure 49 constitutes a violation of the due process clause.

A judgment cannot be taken away by legislation except under specific circumstances. *See Newsom v. Greenwood*, 4 Or. 119, 121-122, 1871 WL 1122 (1871); *Thomas v. City of Portland*, 40 Or. 50, 52 66 P 439 (1901); *Fisk v. Leith et al.*, 137 Or. 459, 299 P 1013 (1931); *Hall v. Northwest Outward Bound School, Inc.*, 280 Or. 655, 572 P.2d 1007 (1977); *Barnes v. City of Portland*, 120 Or. App. 24, 852 P2d 265 (1993); *Ettor v. City of Tacoma*, 228 U.S. 148, 33 S. Ct. 428 (1913); *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994); *Luxford v. Dalkon Shield Claimant's Trust*, 978 F.Supp. 221, 1997 U.S. Lexis 15874 (1997).

The right to damages in *Ettor* closely parallels the petitioners' causes of action. The remedy given was for damages resulting from the city or government's action. It was an extraordinary remedy. Measure 37, acknowledging that the enforcement of certain restrictions could result in damages, gave the landowners a remedy for damages if Metro did not waive their regulations. The court's opinion in *Hall* affirmed the validity of *Ettor*. This issue was not addressed by the Oregon Court of Appeals and must be addressed by this Court if it is found that Measure 49 abolished causes of action under Measure 37.

B. Vacating the judgment violated the takings clause.

> UNITED STATES CONST. AMEND. V states, in pertinent part:
>
> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In *Stop the Beach,* this Court further supported the takings clause, stating:

> [T]hough the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing.

Ibid., 130 S. Ct. 2592, 2601.

This Court continued on to identify various

circumstances where it had found there has been a taking. Here, like in *Webb's Fabulous Pharmacies, Inc. v. Beckman*, 449 U.S. 155, 163-165, 101 S. Ct. 446, 66 L.Ed.2d 358 (1980), there has been a recharacterization as public property of what was previously private property. Here, petitioners' private property — their money judgments against Metro — were taken by judicial action and handed back to Metro by relieving it of its financial obligation.

VI. Assuming *arguendo* that there was an intent by the legislature and the voters to apply Measure 49 retroactively, it would still be repugnant to the constitution to use mootness to justify ordering vacatur under these facts.

> UNITED STATES CONST. AMEND. XIV §1 states, in pertinent part:
>
> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In *Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez*, this Court opined:

> Litigants, we have long recognized, "[a]re entitled to have [their] case tried upon the assumption that ... facts, stipulated into the record, were established." *H. Hackfeld & Co. v. United States*, 197 U.S. 442, 447, 25 S. Ct. 456, 49 L.Ed. 826 (1905). This entitlement is the bookend to a party's undertaking to be

bound by the factual stipulations it submits. See *post*, at 3005 (ALITO, J. dissenting)(agreeing that "the parties must be held to their Joint Stipulation"). As a leading legal reference summarizes:

> "[Factual stipulations are] binding and conclusive ..., and the facts stated are not subject to subsequent variation. So, the parties will not be permitted to deny the truth of the facts stated, ... or to maintain a contention contrary to the agreed statement, ... or to suggest, on appeal, that the facts were other than as stipulated or that any material fact was omitted. The burden is on the party seeking to recover to show his or her right from the facts actually stated." 83 C.J.S. Stipulations § 93 (2000)(footnotes omitted).

This Court has accordingly refused to consider a party's argument that contradicted a joint "stipulation [entered] at the outset of th[e] litigation." *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346, 146 L.Ed.2d 193 (2000). ...[F]actual stipulations are "formal concessions ... that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, a judicial admission ... is conclusive in the case." 2 K. Broun McCormick on Evidence § 254, p. 181 (6th ed. 2006)(footnote omitted).. See also, *e.g.*, *Oscanyan v. Arms Co.*,

> 103 U.S. 261, 263, 26 L.Ed. 539 (1881)("The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced.")

Ibid., 130 S. Ct. 2971, 2983, 177 L.Ed.2d 838 (2010). The 1st Circuit Court of Appeals has stated, "[a] stipulation as to facts also functions as a waiver of legal defenses to the establishment of the particular element to which the parties have stipulated, and therefore is not reviewable on appeal." *United States v. Silva*, 554 F.3d 13, 23-24 (1st Cir. 2009), *citing United States v. Meade*, 175 F.3d 215, 223 (1st Cir. 1999). Under 83 C.J.S. § 86, it states that submission of a matter on stipulated facts is akin to the parties requesting a directed verdict. This Court has held that "[a] party cannot complaint of a judgment or order entered in accordance with his request." *U.S. v. City of Memphis*, 97 U.S. 284, 1877 WL 18624 (U.S. 1877).

After more than 180 days had passed since the submission of their claims, petitioners individually commenced a cause of action for compensation in Clackmas County Circuit Court as provided for under ORS 197.352(6). These four cases were consolidated at the trial court. Subsequent to a stipulated facts trial, the trial court held that each of the petitioners had suffered a loss in fair market value as a result of Metro's land use regulations. A money judgment was entered for petitioners on December 5, 2007, prior to the December 6, 2007, effective date of Measure 49.

Thereafter, each petitioner owned property in the form of a money judgment reflecting the trial court's final determination.

The Oregon Court of Appeals applied reasoning similar to this Court's reasoning in *Plaut*, but did so through the Oregon Court of Appeals' case of *State ex. rel. English v. Multnomah County*, 227 Or. App. 419, 206 P.3d 224 (2009) ("English I"). In *English I*, the Oregon Court of Appeals analyzed its own prior cases of *Corey v. DLCD*, 344 Or. 457, 464, 184 P.3d 1109 (2008) and *Cyrus v. Board of County Com'rs of Deschutes County*, 226 Or. App. 1, 202 P.3d 274 (2009), specifically finding that Measure 49 was retroactive and applied "to *all* Measure 37 claims, successful or not, regardless of where they [were] in the Measure 37 process." *Cyrus* at 6, *quoting Corey* at 465 (emphasis in original). The court further stated ". . . Measure 49 by its terms deprives Measure 37 waivers —*all* orders disposing of Measure 37 claims — of any continuing viability." *Id.*, *quoting Corey* at 466-467 (emphasis in original). *English I* went on to explain the court's mootness determination in *Cyrus* as supported by the availability of litigation of their issues under Measure 49. However, in *English I* the matter was differentiated since the claim was considered "merged" into the judgment and thereby extinguished. *English I* at 428. This differentiation was found to not apply to the instant matter given the voluntary dismissal of that matter during the appellate process by the State of Oregon, resulting in a final determination of the judicial department. The Oregon Court of Appeals explained it as "English had a judgment that (1) adjudicated her Measure 37 claim for just compensation long before the effective date of Measure 49 and (2) was not subject to judicial revision." *Bleeg v. Metro*, 211 P.3d 302, 229 Or. App. 21 (2009), *citing English I* at 428.

While the Oregon Court of Appeals acknowledged that the appeal in *English I* arose from English's efforts to compel the county to satisfy the judgment

for compensation through mandamus proceedings, it ultimately distinguished it from the current matter. Here, since there was a valid stipulation to all facts — including those pertaining directly to whether a valid claim existed under Measure 37 — Metro was should have been limited to challenging claims to which the parties had not entered a stipulation. In *English*, the Oregon Court of Appeals echoed *Corey* and *Cyrus* by stating that "[w]hen the dispute involving a predicate Measure 37 claim for just compensation is ongoing (whether in another forum or on appeal), Measure 49 supersedes the Measure 37 claim and requires the parties to proceed under the new standards in Measure 49 to determine their rights." *English v. Multnomah County*, 229 Or. App. 15, 26, 209 P.3d 831 (Or. App. 2009), (hereafter "*English II*"). In the instant case, the Oregon Court of Appeals erroneously adopted an automatic reversal of the trial court judgments in any and all cases pertaining to Measure 37, regardless of individual circumstances such as in this case where there was a valid and binding stipulation between the parties and the entry of judgment on said stipulated facts, absent any review whatsoever of the merits of the appeal to determine whether affirmation was appropriate to render the trial court judgment final. An apparent violation of the Due Process Clause which requires clarification of the conflicting determinations from this Court under *Plaut* and *Martinez*.

The Oregon Court of Appeals adopted a procedure similar to *Plaut* by applying Measure 49 retroactively to moot petitioners' claims in violation of the Due Process Clause. Because the matter was still pending final determination by the judicial department and Respondent and Petitioners were bound and subject to a

binding stipulation of the parties before the trial Court, in accordance with this court's recent pronouncement in *Martinez*. The only exceptions to the binding effects of stipulations were not argued by Metro nor found by the Oregon Court of Appeals. That court simply erred by mooting an appeal that was directly contrary to the parties' stipulations.

The issue at hand in the trial court was by what method the petitioners' damages should be calculated. Under Metro's method, the claimed damages were zero, and the petitioners stipulated to that. In return, Metro stipulated to the damages under the petitioners' theory. The petitioners won the legal argument, which allowed them to be awarded their damages.

As this Court indicated in *Martinez*, petitioners herein were entitled to rely upon the binding nature of the stipulations of the parties before the trial court, and this is true even if the law changed. The application of a change of law retroactively under *Plaut* to defeat the stipulated facts of the parties would overturn this Court's long-standing precedent under *H. Hackfeld & Co.*, as acknowledged in *Martinez*. It is the petitioners' contention that *Plaut* did not authorize automatic reversals based on changes of law that may moot an inferior court's determination when applied retroactively, since doing so would not account for various circumstances that could exist, such as:

(1) stipulations between the parties as to all of the issues, preventing further judicial review of those stipulated facts and thereby binding the parties to such matter as a final determination of the judicial department; and

(2) circumstances where affirmance on appeal may resort back to the trial court's valid judgment date, predating the change of law at issue; and

(3) circumstances where the change of law overturns a trial court judgment, since no valid claim would remain, leaving the parties without remedy. Contrary to *United States v. Munsingwear, Inc.*, 340 U.S. 6 (1950) and its progeny.

Respondents entered into factual stipulations that bound Metro to facts which were not "reviewable on appeal," *Silva*, 554 F.3d 13 (1st Cir. 2009). The Oregon Court of Appeals violated the holding of *Silva* and petitioners' rights under the Due Process clause by not binding Metro to its factual stipulations. Metro's concession (its stipulation to the liability for compensation for a specified claim) should not be found moot by application of a retroactive change of law, but instead should be held to have been a waiver of its challenge.

VII. The Court should grant certiorari so it can make clear that applying a law retroactively such that it results in "manifest injustice" violates the Due Process clause.

Under *Plaut*, "[w]hen a new law makes clear that it is retroactive, an appellate court must apply [that law] in reviewing judgments still on appeal [that were rendered before the law was enacted], and must alter the outcome accordingly." *Ibid.*, at 212; *see also Landgraf*, 511 U.S. *at* 273-280. This court should grant certiorari to support the 7th Circuit's acknowledgement of this Court's previous holding that applying a law retroactively such that it

results in "manifest injustice" violates the Due Process clause. *See Jideonwo v. I.N.S.*, 224 F.3d 692, 697 (7th Cir. 2000), *citing Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 716, 94 S. Ct. 2006, 40 L.Ed.2d 476 (1974). As the 7th Circuit explained, "[m]anifest injustice may occur where a new law changes existing rights or imposes unanticipated obligations on a party without providing appropriate notice." *Id.*; *see also Bradley*, 416 U.S. at 720; *see also Landgraf*, 511 U.S. at 266.

> Under *Eastern Enterprises v. Apfel*, this Court found that, "[r]etroactive legislation is generally disfavored . . . because it can deprive citizens of legitimate expectations and upset settled transactions." *Ibid.*, 524 U.S. 498, 501, 118 S. Ct. 2131, 2136 (U.S.Mass. 1998), *citing General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S. Ct. 1105, 1112, 117 L.Ed.2d 328 (U.S. Mich. 1992).

In *Bradley*, this Court further indicated:

> We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

Ibid. at 710-717.

The 9th Circuit has recently reiterated the *Bradley* test for retroactivity under *Oregon Natural Desert Ass'n v. Locke*, stating that "[t]he *Bradley* test for whether a newly

passed law should be given retroactive effect examines (1) whether the new law imposes new legal consequences for past conduct, (2) whether manifest injustice would occur by applying the new law, and (3) whether any contrary legislative history exists." *Ibid.*, 572 F.3d 610, 617 (9th Cir. 2009), *citing Bradley,* 416 U.S. at 711-12.

The Court of Appeals abridged the constitution by acting arbitrarily and capricious declaring Measure 49 applied retroactively without findings of fact or conclusions of law to support that declaration.

Petitioners were not placed on appropriate notice that the law affecting their rights under Measure 37 would be changing, nor that Measure 49's intent would be to deprive them altogether of any rights to just compensation for the restrictions placed upon their land by Metro's designation of their property as lying within the urban growth boundary. *See Jideonwo,* 224 F.3rd, 697. Petitioners maintained a legitimate expectation not only in the protections under Measure 37, but in Metro's concession and stipulation that the petitioners were entitled to just compensation therein, which petitioners considered a "settled transaction." *Apfel, supra.* Petitioners maintain no claim under the new Measure 49, unlike the claimants in *Corey* and *Cyrus*, upon which the Oregon Court of Appeals relied heavily in mooting the current matter. They have, in short, no remedy, and that is clearly a change in their existing rights. In fact, at the hearing before the Oregon Court of Appeals in this case, Richard Benner, counsel for respondent Metro said on the record that petitioners would have no rights under Measure 49. Again, such a dismissal represents a significant prejudice against petitioners and inequitable treatment at the hands of the Oregon Court of Appeals.

Thus, application of Measure 49 to moot the trial court judgment of just compensation to the petitioners in this matter evidences a "manifest injustice" requiring review by this Court. This Court should grant certiorari to address the application of the *Bradley* factors in this case and for all those similarly situated, who, like petitioners, maintained a legitimate confidence in stipulations and in the application of existing law.

VIII. The Court should grant certiorari to make clear using mootness to *sua sponte* grant vacatur when in equity results is repugnant to the U.S. Constitution.

In *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) and its prodigy the Supreme Court has held that where intervening mootness prevents appellate review of the underlying decision, the decision below should be vacated only where vacatur is equitable. Vacatur falls within the Court's discretion. That discretion is governed by the use of equitable authority:

> according to which courts dismiss appeals as "moot," "is a pragmatic principle, grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable."

In re Fontainebleau Las Vegas Holdings, LLC, 434 B.R.716, 741 (S.D.Fla., 2010), *quoting Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002).

The Oregon Court of Appeals ordered vacutur which resulted in manifest injustice — without ever assessing the merits of the case.

In *Munsingwear, Inc.*, and its progeny, this Court addressed circumstances in which a case becomes moot while it is pending review by a higher court. A court can only use mootness as a reason to overturn a case involving a change in law and order vacatur when a final judgment is still pending *if* there is finding that vacatur is equitable. Thus, the Oregon Court of Appeals should have assessed the merits of the appeal to determine if Metro **raised any meritorious issues, because** if it was determined that Metro's claims lacked merit, then the trial court judgment would be the final judgment of the judicial department, and the trial court judgment should be upheld. Accordingly, petitioners have judgments, protected from changes in legislative law.

The unjustified application of the mootness doctrine to this case shows that the Oregon Court of Appeals abdicated its responsibility to use its powers equitably. By (1) denying the constitutional right of just compensation under the existing law at the time the trial court determined the case, based on the parties' stipulations, (2) refusing to review the merits of the appeal, and (3) failing to require proper procedure under either the preservation rule or mootness doctrine, the Oregon Court of Appeals failed to meet its burden of rendering an equitable determination for petitioners.

IX. Due process of law relies on the courts' adherence to maxims of law.

A maxim of law is an established principle or proposition, and a principle of law universally admitted, as being just and consonant with reason. 1 Bl. Com. 68. Maxims are principles and authorities, and are part of the general customs or common law of the land.

In the present matter, petitioners invoke the due process of law as a constitutional right denied them by both the Oregon Supreme Court and the Oregon Court of Appeals. The constitutional guarantee of due process of law is, set forth in UNITED STATES CONST. AMEND. V, in pertinent part, as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Due process of law, as it relates to the maxims of law defined *supra*, is also defined in *Black's Law Dictionary* as follows:

> Due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs . . .

> Aside from all else, "due process" means fundamental fairness and substantial justice. *Vaughn v. State, 3 Tenn.Crim.App. 54,* 456 S.W.2d 879, 883.

Ibid. at 500 (6th ed. 1990).

Due Process is a principle of law that limits the exercise of governmental powers. A guarantee that courts equitably exercise the power vested in them by the constitution and the trust of the people falls well within the right of due process; courts shall not be unreasonable, arbitrary or capricious. Consequently, it is unacceptable that the Oregon Court of Appeals has been permitted to not only violate the petitioners' right of due process, but to trespass the sacred responsibility to use their power judiciously.

CONCLUSION

The Oregon Court of Appeals, in spite of its earlier contrary conclusion in *Corey v. DLCD* has adopted the position that constitutional "vested property rights" are a thing of the past and that these "rights" no longer exist for purposes of constitutional protection. In doing so, the Oregon courts are unilaterally and without authority overruling U.S. Supreme Court opinion on the matter. Petitioner aver such an arbitrary rejection of established state law and U.S. Supreme Court jurisprudence is unconstitutional and renders the judicial department complicit in effecting the same sort of taking described in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592, 177 L.Ed.2d 184 (2010).

As set forth in the preceding arguments: The Oregon Court of Appeals exceeded their jurisdiction in reviewing Measure 49; misinterpreted the statutory meaning of Measure 49; applied Measure 49 retroactively without explicit legislative intent; unlawfully abolished petitioners' cause of action under Measure 37; unconstitutionally took petitioners' property rights; ignored prior stipulations that were legally binding; and vacated petitioners' judgments and deserted them without means to remedy damages.

It has been clearly shown that the Oregon Court of Appeals failed to exercise its powers or discharge its responsibilities according to the established maxims of law, and thereby violated petitioners' constitutional rights.

For the reasons set forth above, Virginia Bleeg, Harold S. Maclaughlan and Rebecca Maclaughlan

respectfully request that this Court grant this petition for writ of certiorari.

Respectfully submitted,

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